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No. 11342

United States
Circuit Court of Appeals
For the Ninth Circuit.

POLSON LOGGING COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record
In Three Volumes
VOLUME II
Pages 235 to 528

Upon Appeal from the District Court of the United States for the Western District of Washington Southern Division

FILED
OCT 1 - 1946
PAUL P. O'BRIEN, CLERK

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

J. EDWARD WILLIAMS, ESQ.,

Acting Head, Lands Division, Department of Justice,

F. P. KEENAN, ESQ.,

Special Attorney, Lands Division, Department of Justice,

Skinner Building, Seattle, Washington,
Attorneys for Petitioner-Appellee.

F. D. METZGER, ESQ.,

L. B. DONLEY, ESQ.,

METZGER, BLAIR, GARDNER & BOLDT,

Tacoma Building, Tacoma, Washington,

Attorneys for Respondent-Appellant,
Polson Logging Company, a Corporation.

United States Circuit Court of Appeals
For the Ninth Circuit

POLSON LOGGING CO.,

vs.

UNITED STATES OF AMERICA,

MANDATE

United States of America—ss.

The President of the United States of America:

To the Honorable the Judges of the District Court of the United States for the Western District of Washington, Southern Division, Greeting:

Whereas, lately in the District Court of the United States for the Western District of Washington, Southern Division, before you, or some of you, in a cause between United States of America, petitioner, and Polson Logging Company, a corporation, et al., respondents, No. 323, a judgment on declaration of taking was duly filed on the 23rd day of May, 1944, which said judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by Polson Logging Company, a corporation, as appellant, against United States of America, as

appellee, agreeable to the Act of Congress in such cases made and provided, fully and at large appears:

And Whereas, on the 23rd day of April in the year of our Lord One Thousand Nine Hundred and Forty-Five the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and upon motion of appellee to dismiss appeal herein, and was duly [1*] submitted.

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the motion to dismiss be, and hereby is granted, and that the appeal in this cause be, and hereby is, dismissed. (June 6, 1945.)

You, Therefore, Are Hereby Commanded that such further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, this 26th day of June, in the year of our Lord One Thousand Nine Hundred and Forty-Five and of the Independence of the United States of America the One Hundred and Sixty-Ninth.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

* Page numbering appearing at foot of page of original certified Transcript of Record.

Let the within Mandate be entered this 29th day of June, 1945.

/s/ CHARLES H. LEAVY,
United States District Judge.

Approved June 29, 1945.

ANTHONY L. STELLA,
Special Atty., Lands Division,
Dept. of Justice.

Approved, June 29, 1945.

METZGER, BLAIR &
GARDNER,
F. D. METZGER,
By A. E. BLAIR,
Attorneys for Polson Logging Co.

[Endorsed]: Filed June 29, 1945. [2]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 29th day of June, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

No. 323

UNITED STATES OF AMERICA,

Petitioner,

vs.

POLSON LOGGING CO., a Corp., et al.,

Respondent.

Now on this 29th day of June, 1945, in the above matter, the clerk presents mandate dismissing appeal of appellant, which is signed by the court and filed. [3]

October 22, 1943.

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I have this day received from the Department of Agriculture Check No. 11,286 in the amount of Six Hundred Eighty-Eight ($688.00) Dollars remaining estimated sum of total estimated just compensation of $8,969.00 of which $8,280.00 heretofore has been deposited for the acquisition of fee simple title over and across certain parcels of land in Grays Harbor County designated as Tracts 1, 2 and 3, United States of America, Petitioner, vs. Polson Logging Company, a corporation, et al., Respondents. Cause 323.

I further certify that I have this day deposited the aforesaid moneys in the Registry of this Court.

Witness my hand and official seal at Tacoma, Washington, this 22d day of Oct., 1943.

[Seal] JUDSON W. SHORETT,
Clerk.

By /s/ E. REDMAYNE,
Deputy. [4]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 8th day of Sept., 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 8th day of September, 1945, this cause comes on before the court for hearing on application for leave for jury to view premises in above cause. Mr. Metzger addresses the court re application. The court now denies application and exception allowed the defendant. The court now orders that a presentation of all legal issues and argument on same that are preliminary to the trial shall be heard on Wednesday, September 19 at 10 a.m. [5]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 18th day of September, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 18th day of September, 1945, the above cause comes on for hearing on motion of the government to Amend Declaration of Taking. A. L. Stella and Aileen Hogshire, Spec. Attys., Dept. of Justice, represent the government. F. D. Metzger and A. E. Blair represent the respondent. Argument on motion by Mr. Stella. Argument opposing motion by Mr. Metzger. Further argument by Mrs. Hogshire. The court now grants the motion to amend, said amendment not to include new lands, but to correct description of lands as taken by Declaration of Taking. Trial date of September 20 is now vacated on the court's own motion and cause to be placed on assignment calendar on September 24. The court states that a hearing on all law matters pertaining to the above cause will be had on Thursday, September 20 at 2 p. m.

[Title of District Court and Cause.]

MOTION FOR AN ORDER TO AMEND DECLARATION OF TAKING AND SUBSEQUENT PLEADINGS

Comes Now the petitioner, United States of America, by its undersigned attorneys and moves the Court for an order amending the declaration of taking filed November 12, 1943, and all pleadings subsequent thereto, to correct the description of that portion of the land described therein and designated line "F" set forth on page 9 of said declaration of taking as follows:

1. By inserting on line 17 of page 9 of said declaration of taking after the second course "thence N. 83° 30′ E. 240 feet" the course "thence N. 89° 40′ E. 300 feet";

2. By substituting for the description of line "F" the following description:

> Line "F" is land 100 feet in width, extending 50 feet on each side of the center line, being 1.21 miles in length and containing 14.7 acres, more or less, described as follows: Beginning at Station 339/25 of U. S. Highway Number 101, said point being west 289 feet and south 4.6 feet from the northeast corner of Section 11, Township 21 North, Range 10 West of the Willamette Meridian, and running thence S. 73° 35′ E. 290 feet; thence N. 83°30′ E. 240 feet; thence N. 89° 40′ E. 300 feet; thence S. 83° 55′ E. 560 feet; thence N. 72° 15′

E. 140 feet; thence N. 52° 24′ E. 200 feet; thence N. 57° 31′ E. 1360 feet; thence N. 69° 29′ E. 240 feet; thence N. 83° 41′ E. 200 feet; thence N. 86° 58′ E. 700 feet; thence N. 87° 38′ E. 730 feet; thence S. 85° 36′ E. 200 feet (Station 51/60); thence S. 76° 06′ E. 260 feet; thence S. 49° 25′ E. 480 feet; thence S. 52° 49′ E. 360 feet; thence S. 74° 06′ E. 137.5 feet to the east line of Section 1, Township 21 North, Range 10 West of the Willamette Meridian;

in all pleadings filed subsequent to said declaration of taking. [7]

This motion is based on the affidavit of Anthony L. Stella attached hereto and upon the files and records herein.

UNITED STATES OF AMERICA,
By F. P. KEENAN,
Special Assistant to the Attorney General.

ANTHONY L. STELLA,
Special Attorney, Department of Justice.

(Acknowledgment of Service.)

State of Washington,
County of Pierce—ss.

Anthony L. Stella, being first duly sworn on oath deposes and says that he is a Special Attorney in the Department of Justice and one of the attorneys

for petitioner and as such makes this affidavit in support of petitioner's motion for an order amending the declaration of taking filed herein on November 12, 1943, and all subsequent pleadings to correct the description of the property designated line "F"; that through inadvertance the third course "thence N. 89° 40′ E. 300 feet" was omitted in the description of line "F" on line 17 of page 9 following the course "thence N. 83° 30′ E. 240 feet"; that in order to correct the description, it is necessary and proper that an order be entered correcting the declaration of taking and all subsequent pleadings as requested in petitioner's motion; that the description of line "F" as corrected by the insertion of the third course "thence N. 89° 40′ E. 300 feet" after the second course "thence N. 83° 30′ E. 240 feet" on line 17 of page 9 of said declaration of taking and the description of line "F" so corrected in all subsequent pleadings is the identical property which was purported to be described as line "F" in said declaration of taking and delineated on the plat annexed to said declaration of taking identified as Schedule "A".

ANTHONY L. STELLA.

Subscribed and sworn to before me this 18th day of September, 1945.

[Seal] /s/ LEO A. McGOVICK,
Notary Public in and for the State of Washington, residing at Tacoma.

[Endorsed]: Filed Sept. 18, 1945. [9]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 20th day of September, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 20th day of September, 1945, this cause comes on for hearing on matters of law. A. L. Stella and Nona Cox, Spec. Attys., Dept. of Justice, represent the government and F. D. Metzger represents the respondent. Order amending declaration of taking and subsequent pleadings signed by the court and filed. Exceptions of respondent Polson Logging Company to order amending Declaration of Taking and subsequent pleadings allowed respondent and signed by the court and filed. Argument on respondent's motion to dismiss declaration of taking by Mr. Metzger. Argument by Mrs. Cox. Rebuttal argument by Mr. Metzger. The court now denies respondent's motion to dismiss and exception allowed. [10]

[Title of District Court and Cause.]

ORDER AMENDING DECLARATION OF TAKING AND SUBSEQUENT PLEADINGS

This Matter having come on regularly for hearing upon motion of the petitioner, United States of America, appearing through Anthony L. Stella, Special Attorney, Department of Justice, for an order amending the declaration of taking filed November 12, 1943, and all pleadings subsequent thereto including the second amended petition in condemnation; Metzger, Blair and Gardner appearing for the respondent Polson Logging Company; and it appearing that through inadvertence the third course was omitted from the description of line "F" in said declaration of taking and all subsequent pleadings including the second amended petition in condemnation; the Court having considered said motion and the affidavit of Anthony L. Stella in support thereof and the records and files herein and being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered:

1. That the declaration of taking filed November 12, 1943, be and it is hereby amended by inserting in the description of line "F" after the second course "thence N. 83° 30′ E. 240 feet" on line 17 of page 9 of said declaration of taking the course "thence N. 89° 40′ E. 300 feet"; and

2. That all pleadings filed subsequent to said declaration of taking, including the second amended petition in condemnation, be and they are hereby

amended by [11] substituting for the description of line "F" the following description:

Line "F" is land 100 feet in width, extending 50 feet on each side of the center line, being 1.21 miles in length and containing 14.7 acres more or less, described as follows: Beginning at Station 339/25 of U. S. Highway Number 101, said point being west 289 feet and south 4.6 feet from the northeast corner of Section 11, Township 21 North, Range 10 West of the Willamette Meridian, and running thence S. 73° 35′ E. 290 feet; thence N. 83° 30′ E. 240 feet; thence N. 89° 40′ E. 300 feet; thence S. 83° 55′ E. 560 feet; thence N. 72° 15′ E. 140 feet; thence N. 52° 24′ E. 200 feet; thence N. 57° 31′ E. 1360 feet; thence N. 69° 29′ E. 240 feet; thence N. 83° 41′ E. 200 feet; thence N. 86° 58′ E. 700 feet; thence N. 87° 38′ E. 730 feet; thence S. 85° 36′ E. 200 feet (Station 51/60); thence S. 76° 06′ E. 260 feet; thence S. 49° 25′ E. 480 feet; thence S. 52° 49′ E. 360 feet; thence S. 74° 06′ E. 137.5 feet to the east line of Section 1, Township 21 North, Range 10 West of the Willamette Meridian.

Done in Open Court this 20th day of September, 1945.

CHARLES H. LEAVY,
United States District Judge.

Presented by:

ANTHONY L. STELLA,
Special Attorney, Department of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Sept. 20, 1945. [12]

[Title of District Court and Cause.]

EXCEPTIONS OF DEFENDANT POLSON LOGGING COMPANY TO ORDER AMENDING DECLARATION OF TAKING AND SUBSEQUENT PLEADINGS

Comes now the defendant Polson Logging Company, a corporation, and excepts to the order of the Court amending the declaration of taking filed herein November 12, 1943, and all subsequent pleadings, as follows:

(1) The recital therein, namely, "it appearing that through inadvertence the third course was omitted from the description of line "F" in said declaration of taking and all subsequent pleadings including the second amended petition in condemnation," is unwarranted by any evidence before the Court and without foundation in fact.

(2) The Court is without jurisdiction or authority to amend the declaration of taking signed by Paul H. Appleby, Under Secretary of Agriculture, November 2, 1943, and filed herein November 12, 1943, because said declaration of taking is an independent and non-judicial act of an administrative officer of the United States and, if amendable at all, amendable solely by the administrative officer of the United States who made the same in the first instance.

(3) That said order is violative of the constitutional rights of this defendant in that it results in the taking of property of this defendant without

authority of law and [13] in violation of the due process and eminent domain clauses of the Fifth Amendment to the Constitution of the United States.

(4) The Court being without jurisdiction or authority to amend said declaration of taking, the amendment of all pleadings filed subsequently thereto is without foundation in fact and unwarranted in law.

Dated September 20, 1945.

L. B. DONLEY,
F. D. METZGER,
METZGER, BLAIR &
GARDNER,
Attorneys for Defendant
Polson Logging Company.

The foregoing Exceptions were separately presented and taken at the time of presentation of the order to which they relate, and they are, and each of them is, hereby allowed.

Done in Open Court this 20th day of September, 1945.

/s/ CHARLES H. LEAVY,
District Judge.

[Endorsed]: Filed Sept. 20, 1945. [14]

[Title of District Court and Cause.]

MOTION TO QUASH AND ADJUDGE NULL AND VOID THE DECLARATION OF TAKING FILED HEREIN NOV. 12, 1943, AND TO VACATE JUDGMENT ENTERED THEREON MAY 23, 1944

Comes now defendant Polson Logging Company, a corporation, by L. B. Donley and Metzger, Blair & Gardner, its attorneys, and,

I.

Renews its challenge to the sufficiency, effectiveness and validity of the Declaration of Taking, executed by Paul H. Appleby, as Under-Secretary of Agriculture of the United States, November 2, 1943, and filed herein November 12, 1943, and moves the Court to quash and set aside said Declaration of Taking or otherwise adjudge the same null and void and of no effect.

II.

Moves to quash, vacate, set aside or otherwise adjudge null and void that certain judgment entitled "Judgment on Declaration of Taking," entered in this court and cause May 23, 1944.

The foregoing challenge and motions are made upon the following grounds:

1. That the said Paul H. Appleby, as Under-Secretary of Agriculture of the United States, is wholly unauthorized to acquire for and on behalf of the United States the real estate described in said Declaration of Taking or any real estate what-

soever, or to make and execute a Declaration of [15] Taking provided for by Section 1 of Chapter 307 of the Act of Congress approved February 6, 1931, (46 Statutes, 1421; 40 U.S.C., Section 258a).

2. That said Declaration of Taking wholly fails to show that the said Paul H. Appleby, as Under-Secretary of Agriculture of the United States, or any other officer of the Department of Agriculture of the United States, was or is authorized by law to acquire the real estate described in said Declaration.

3. That said Declaration of Taking was and is a nullity and void because the acts or instruments of authorization therein specified and relied on do not, either as a matter of fact or as a matter of law, authorize the acquisition by the Under-Secretary of Agriculture of the United States, or by any other officer of the United States, of the real estate described in said Declaration of Taking.

4. That in making and entering said Judgment, this Court acted without authority of law and in excess of its jurisdiction.

5. That said Declaration of Taking and said Judgment thereon, in so far as they together or either of them standing alone purports to or is effective to vest in the United States title to the real estate described therein, constitute a taking of the property of this defendant without due process of law and are, and each of them is, repugnant to and violative of the due process and eminent do-

main clauses of the Fifth Amendment to the Constitution of the United States and the Ninth Amendment to the Constitution of the State of Washington.

L. B. DONLEY,
METZGER, BLAIR &
GARDNER,
F. D. METZGER,
Attorneys for Defendant,
Polson Logging Company.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 20, 1945. [16]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 24th day of September, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said court:

[Title of Cause.]

Now on this 24th day of September, 1945, the Court calls the assignment calendar and the following cases are set for trial:

* * * *

Cause No. 323 set for trial on November 12, 1945.

A. L. Stella, Spec. Atty., Dept. of Justice, represents the government and F. D. Metzger represents the defendant. Order fixing date as of which property is to be valued signed by the court and filed. Order presented by Mr. Metzger. Plaintiff and defendant exceptions to above order signed by the Court and filed. [17]

[Title of District Court and Cause.]

ORDER FIXING DATE AS OF WHICH PROPERTY IS TO BE VALUED

This cause having come on for pre-trial hearing upon the application of Anthony L. Stella, Special Attorney, Department of Justice, United States of America, for an order fixing the date as of which the value of or the just compensation to be paid for the property taken or sought to be taken shall be determined, F. D. Metzger and A. E. Blair of Metzger, Blair & Gardner appearing for the defendant, Polson Logging Company, and the Court having considered said application and the arguments of counsel for the petitioner and for the defendant, Polson Logging Company, in respect thereto, and being advised in the premises,

Doth Now Order that for the purpose of the determination of the just compensation to be paid, the value of the property taken or sought to be taken shall be determined as of October 22, 1943, but that in determining such value, the value of

the improvements, if any, made by the petitioner to or upon the property taken or sought to be taken between February 5, 1942, and October 22, 1943, shall be excluded.

Done in Open Court this 24th day of September, 1945.

CHARLES H. LEAVY,

Judge.

Presented by:

/s/ F. D. METZGER. [18]

Petitioner duly excepted to the foregoing order in so far as it fixes the date of valuation as October 22, 1943, instead of February 5, 1942.

Defendant, Polson Logging Company, duly excepted to the foregoing order in so far as it excludes from consideration in determining the just compensation the value of the improvements, if any, made by the petitioner between February 5, 1942, and October 22, 1943.

The foregoing exceptions are, and each of them is, hereby allowed.

Dated September 24, 1945.

CHARLES H. LEAVY,

Judge.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Sept. 24, 1945. [19]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 12th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 12th day of November, 1945, this cause comes on for trial to the court before a jury. F. P. Keenan and A. L. Stella, Spec. Attys. for the Dept. of Justice, represent the government and F. D. Metzger and A. E. Blair represent the respondent. Case is called. Both sides ready. Order denying respondent's motion to dismiss signed by the court and filed. Answer of Polson Logging Co., to second amended petition filed.

The clerk draws the names of 12 jurors. All jurors are sworn to answer questions. Jurors Irving Bertke, James Stewart, Gerhard Kirkebo, Fieldy Gleason, Halsey Scovell, Harold Mann excused for cause. The petitioner challenges Alexander Schermerhorn, Sidney McCoy and Earl Brassfield. Respondent challenges John Hoyt. The following jurors are sworn to try cause: Earl Brantner, Ellsworth Clow, Ora Murrey, Carl Gillette, Frank Thompson, Fred Gifford, Albert Weiss, Robert Lasley, Herman Olsen, Claude Christiansen, Harry Fellows, Neal Thorsen. [20]

The balance of the jurors are excused subject to call.

At 11:02 jurors are admonished and court is recessed 15 minutes. At 11:22 court is again in session. All jurors, counsel and parties present. Trial is commenced. Mr. Keenan makes oral motion that the burden of proof rests on the respondent. Motion denied and exception allowed. Opening statement by Mr. Keenan. Petitioner's Exhibit 1 admitted. Petitioner Witness J. M. Rands sworn and testifies. Petitioner Exhibit 2 admitted.

At 12 noon court recessed until 1:30 p.m.

At 1:30 court is again in session. All jurors, counsel and parties present. Trial is resumed. Petitioner Witnesses Lester Edge, Ward W. Gano and Earl Phillips sworn and testify. Petitioner Exhibits 3, 4, 5, 6, 7 and 8 marked for identification and offered. Objections to Exhibits 3 and 6 sustained and same are not admitted. Exhibits 4, 5, 7 and 8 admitted.

At 3:30 jurors are excused until 10 a.m. Tuesday. Remarks by all counsel and the court re benefits of condemnation. [21]

[Title of District Court and Cause.]

Order Denying Respondent, Polson Logging Company's, Motion to Dismiss, Strike and Demurrer to Petition in Condemnation Filed May 23, 1944, and Motion to Quash and Adjudge Null and Void Declaration of Taking Filed November 12, 1943, and Motion to Vacate Judgment on Declaration of Taking Entered May 23, 1944.

This Cause having come on for hearing on September 20, 1945, upon respondent, Polson Logging Company's Motion to Dismiss, Strike and Demurrer to Petition in Condemnation verified May 1, 1944, and filed herein May 23, 1944, and upon its Motion to Quash and Adjudge Null and Void the Declaration of Taking filed herein November 12, 1943, and to Vacate Judgment on the Declaration of Taking entered May 23, 1944, respondent appearing by F. D. Metzger of Metzger, Blair & Gardner, attorneys of record for said respondent, and petitioner appearing by Anthony L. Stella and Nona F. Cox, Special Attorneys, Department of Justice, the Court having heard the oral arguments on said motions and demurrer and deeming it proper to deny said motions and overrule said demurrer and being fully advised in the premises;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed as follows:

1. That respondent's Motion to Dismiss and Strike the Second Amended Petition in Condemna-

tion verified May 1, 1944, and filed herein on May 23, 1944, be and the [22] same is hereby denied.

2. That respondent's demurrer to said Second Amended Petition be and the same is hereby overruled.

3. That respondent's Motion to Strike from said Second Amended Petition all references to those portions of land designated as Tracts 2 and 3 and Lines J and K, and that portion of Line B extending from Station 265/10 which is the beginning point of Line G to its terminus at the east Line of Section 11, Township 21 North, Range 9 West, W. M., be and the same is hereby denied.

4. That respondent's Motion to Quash, Adjudge Null and Void and Set Aside the Declaration of Taking filed herein November 12, 1943, and Motion to Vacate and Set Aside Judgment on said Declaration of Taking, entered thereon May 23, 1944, be and the same is hereby denied.

The respondent excepts to the foregoing order and said exception is allowed.

Done in Open Court this 12th day of November, 1945.

CHARLES H. LEAVY,
United States District Judge.

Presented by:

ANTHONY L. STELLA,
Special Attorney, Department of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Nov. 12, 1945. [23]

[Title of District Court and Cause.]

ANSWER OF POLSON LOGGING COMPANY TO SECOND AMENDED PETITION IN CONDEMNATION

Comes now defendant Polson Logging Company, a corporation, by its attorneys, L. B. Donley and Metzger, Blair & Gardner, and without waiving its Motion to Quash or otherwise Adjudge Void and of no Effect the Declaration of Taking filed herein November 12, 1943, and to Vacate, set aside and adjudge of no effect the Judgment on said Declaration of Taking entered May 23, 1944, and to dismiss the Second Amended Petition in Condemnation herein, but still insisting and relying upon said motions, and each of them, and alleges and shows to the Court that it is the owner in fee simple of all the lands described in Petitioner's Second Amended Petition in Condemnation, save and except so much of said lands as lie within Section 16, Township 21 North, Range 9 West of the Willamette Meridian, and that as to such of said lands as lie within said Section 16, it is the owner of an easement granted by the State of Washington therein and thereover for the use of said lands for the transportation and removal of logs and other forest or natural products, and for its answer to the Second Amended Petition in Condemnation, alleges as follows:

FIRST DEFENSE

That said Second Amended Petition in Condemnation fails [24] to state any authority for the

acquisition of the lands and real estate therein described or of any part of said lands, and fails to state any facts or authority for the institution and prosecution of a proceeding in eminent domain for the acquisition of said lands and real estate or any part thereof, or any facts upon which the relief prayed or any relief can be granted.

SECOND DEFENSE

I.

Defendant denies that the Acts of Congress specified in Paragraph I of the Second Amended Petition in Condemnation, to-wit:

> The Act of Congress approved June 4, 1897, (30 Stat. 34-36);
>
> The Act of Congress approved November 9, 1921, (42 Stat. 212, 218);
>
> The Act of Congress approved September 5, 1940, (54 Stat. 867);
>
> The Act of Congress approved July 12, 1943, (Public Law 129, 78th Congress, Chapter 215, 1st session);
>
> The Act of Congress approved July 13, 1943, (Public Law 146, 78th Congress, Chapter 236, 1st session); and
>
> The Department of Agriculture Appropriation Act of 1942 (c. 267, 1st session Pub. Laws, 144, 77th Congress);

or any of them, or any act supplementary to or amendatory of said acts, or any of them, authorize

the United States to acquire the lands described in said Second Amended Petition in Condemnation; denies that the Act of August 1, 1888, c. 728 (25 Stat. 357), or any act supplementary thereto or amendatory thereof, authorized the United States to acquire said lands by condemnation; and denies that said lands are or can be taken under or in accordance with the Act of Congress approved [25] February 26, 1931 (46 Stat. 1421, 40 U.S.C. Sec. 258a) or under or in accordance with any act supplementary thereto or amendatory thereof.

II.

For answer to Paragraph II of said Second Amended Petition in Condemnation, defendant denies that it is necessary and advantageous to acquire for the United States by condemnation or otherwise the lands described in said Second Amended Petition in Condemnation for the purposes described in said acts, expressly denying that any of the acts referred to authorize the acquisition of such lands or any of them, and not having information sufficient to form a belief as to the remaining allegations in said Paragraph II contained, denies each and every other allegation in said paragraph contained, expressly and directly denying that the purported selection, designation and determination of the Under-Secretary of Agriculture of the United States have ever been or are now in full force and effect.

III.

Answering Paragraph VI of said Second

Amended Petition in Condemnation, this defendant denies each and every allegation therein contained, save and except that it admits that $8,968.00 has heretofore been deposited in the registry of this court, and that the original petition in condemnation was filed herein on January 21, 1942, particularly denying that any title whatsoever, whether in full fee simple absolute or otherwise, has been taken or may be taken under the laws and Constitution of the United States and particularly the due process and eminent domain clauses of the Fifth Amendment to the Constitution of the United States and the Ninth Amendment [26] to the Constitution of the State of Washington under or by virtue of any Declaration of Taking heretofore filed in this cause.

Wherefore, defendant prays that Petitioner take nothing by virtue of its Second Amended Petition in Condemnation, but that the same may be dismissed and this defendant may go hence with its costs and disbursements herein required to be expended, but that if it be determined that the Petitioner is entitled to acquire said lands, or any part thereof, by condemnation, the just compensation to be paid this defendant for such of its lands as shall be taken shall be determined by a jury of twelve persons, in accordance with the Constitutions of the United States and of the State of Washington, and that it may have judgment for the amount of such compensation with interest as

may be provided by law and for its costs and disbursements herein caused to be expended.

POLSON LOGGING COMPANY,
By /s/ F. D. METZGER,
/s/ L. B. DONLEY,
/s/ METZGER, BLAIR & GARDNER,
Its Attorneys. [27]

United States of America,
Western District of Washington,
Southern Division—ss.

F. A. Polson, being first duly sworn, on oath, deposes and says: That he is the President of Polson Logging Company, a corporation, the answering defendant herein, and authorized to make this verification for and on its behalf; that he has read the above and foregoing Answer of Polson Logging Company to Second Amended Petition in Condemnation, knows the contents thereof, and believes the same to be true.

F. A. POLSON.

Subscribed and sworn to before me this 10th day of November, 1945.

[Seal] F. D. METZGER,
Notary Public in and for the State of Washington, residing at Tacoma.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Nov. 12, 1945. [28]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 13th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said court:

[Title of Cause.]

Now on this 13th day of November, 1945, this cause comes on for further trial. All jurors, counsel and parties present. Trial is resumed. Petitioner Witness Earl Phillips resumes the witness stand and further testifies. On oral motion of Mr. Stella and no objections by Respondent, Petitioner Exhibits 4 and 5 having previously been admitted, are now withdrawn and the jury is instructed to disregard same. Petitioner Exhibit 9 admitted. Petitioner Witness B. D. La Salle sworn and testifies. Petitioner Exhibits 10, 11, 12, 13, 14, 15, 16, 17 admitted. Petitioner Witness Leonard Blodgett sworn and testifies.

At 11 a.m. court recessed. At 11:15 court is again in session. All jurors, counsel and parties present. Trial is resumed. Petitioner Witness W. H. Abel sworn and testifies.

At 12 noon court recessed until 1:45 p.m. At 1:45 p.m. court is again in session. All jurors, counsel and parties present. Trial is resumed.

Petitioner Witness W. H. Abel resumes the witness stand and further testifies. Petitioner Witness Paul H. Logan sworn and testifies. [29]

At 2:50 court recessed. At 3:05 court is again in session. Ex parte matters heard. At 3:10 trial is resumed. All jurors, counsel and parties present. Petitioner Witness Paul H. Logan resumes the witness stand and further testifies. Petitioner Witnesses Norman Porteous, W. H. Thomas sworn and testify. Petitioner Witness Norman Porteous recalled and further testifies. At 4:15 petitioner rests and the jurors are excused until 10 a.m. Wednesday. Mr. Metzer now moves the court that the action be dismissed as to Tracts 2 and 3. The court permits the petitioner to make proof as to the use of Tracts 2 and 3 and the court will later consider the motion. Mr. Metzger moves that the court dismiss the action as to the Respondent Polson Logging Company. [30]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 14th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said court:

[Title of Cause.]

Now on this 14th day of November, 1945, this cause comes on for further trial. All counsel and parties present. Juror Harry Fellows not present due to illness. The jurors are temporarily excused. In the absence of the jury counsel for petitioner and respondent stipulate that if Juror Harry Fellows is not able to be present on Monday, November 19, that the trial will proceed with 11 jurors. The jurors return to the court room and at 10:15 a.m. jurors are excused until Monday at 10 a.m. Remarks by the court and all counsel re stipulation in certain matters. [31]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the 19th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceeding had were the following, truly taken and correctly copied from the Journal record of said court:

[Title of Cause.]

Now on this 19th day of November, 1945, this cause comes on before the court for further trial. All jurors, counsel and parties present. Trial is resumed. Petitioner files requested instructions, Respondent files requested instructions. Permission of the court having been obtained, the petitioner reopens its case. Petitioner Witnesses Lester Edge, Paul H. Logan, W. H. Thomas, H. D. La Salle, W.

H. Abel and Norman Porteous all recalled and further testify.

At 10:25 the government rests. Mr. Metzger on behalf of the respondent now renews motion that petition be dismissed as to Tracts 2 and 3. Motion denied and exception allowed.

Opening statement by Mr. Blair on behalf of respondent. Respondent Witness Andrew Anderson sworn and testifies. Respondent Exhibits A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-10 and A-11 admitted.

At 11:02 court recessed 15 minutes. At 11:17 court is again in session. All jurors, counsel and parties present. [32] Trial is resumed. Respondent Witness Andrew Anderson resumes the stand and further testifies.

At 12:10 court recessed until 1:45. At 1:45 p.m. court is again in session. All jurors, counsel and parties present. Trial is resumed. Respondent Witness Andrew Anderson resumes the witness stand and further testifies. Respondent Witness Lem Forrest sworn and testifies. Respondent Exhibit A-12 admitted.

At 3:10 court recessed 15 minutes. At 3:25 court is again in session. All jurors, counsel and parties present. Trial is resumed. Respondent Witnesses Charles E. Reynolds and Blain H. McGillicudy sworn and testify. Respondent Exhibit A-13 marked for identification and offered. Objections by Petitioner sustained and exhibit not admitted.

At 4:40 jurors are excused until 10 a.m. Tuesday.

In the absence of the jurors Mr. Blair makes offer of proof by Respondent Witness Charles Reynolds. Objections of petitioner sustained and offer of proof denied. Mr. Blair makes offer of proof by Respondent Witness Blain McGillicudy. Objections of petitioner sustained and offer of proof denied. [33]

[Title of District Court and Cause.]

REQUESTED INSTRUCTIONS OF PETITIONER

Comes Now the petitioner and requests that the following instructions be submitted to the jury.

/s/ F. P. KEENAN,
/s/ ANTHONY L. STELLA,
Attorneys for Petitioner. [34]

Instruction No. I.

It is the duty of the Court to explain to you the issues of this case, which you are called upon to determine by your verdict, and to instruct you as to the applicable rules and principles of law by which you must be guided in your deliberations. It is your duty to accept these instructions as correct and, so far as the law of the case is concerned, to be guided by them.

The Government of the United States possesses what is known in law as the power of eminent domain. This means that in the exercise of its legitimate functions it has the right to take private prop-

erty whenever such property is necessary for the public use. In the exercise of that power the Government institutes a condemnation action. [35]

Instruction No. II.

In your deliberations there is no room for sympathy, sentiment, or prejudice or passion. It is your duty to weigh the evidence calmly and dispassionately; to regard the interests of the parties to this action as the interests of strangers; and to decide the issues upon the merits. All persons are equal before the law, and all are entitled to exact justice, no more and no less. [36]

Instruction No. III.

The just compensation to which the owners of condemned property are entitled is the cash market value of the property. Market value is the amount that in all reasonable probability would be arrived at in a sale for cash between an informed owner, willing but not compelled to sell, and an informed buyer, willing but not compelled to buy. In arriving at that value you will take into account all of the considerations that would fairly be brought forward and reasonably be given weight by well-informed men engaged in such bargaining.

Central Pacific Railroad v. Feldman, 152 Cal. 310; Sacramento Southern Ry. v. Heilbron, 156 Cal. 408; East Bay Municipal, etc., Dist. v. Keefer, 99 Cal. App. 240; Temescal Co. v. Marvin, 121 Cal. App. 512; Olson v. United States, 292 U. S. 146; Orgel on Valuation, pp. 62 ff. [37]

Instruction No. IV.

Since the fair cash market value is the amount that in all reasonable probability would be arrived at in a sale for cash between an informed owner, willing but not compelled to sell, and an informed buyer, willing but not compelled to buy, you should not consider any unwillingness of the owner to sell the property or have it condemned.

Likewise, you should not consider the value of the property to the Government in determining its fair cash market value. The fact that the Government needs the property in no way serves to increase the market value, and you should not consider the Government's need in your deliberations. [38]

Instruction No. V.

The respondent, Polson Logging Company, has the burden of proving the just compensation to which it is entitled by the fair preponderance of the evidence.

Instruction No. VI.

By a fair preponderance of the evidence as used in these instructions, is not necessarily meant the greater number of witnesses furnished by either side, but rather that evidence which when considered by you in relation with all the other evidence proffered by either side, is the more convincing to your minds.

Instruction No. VII.

In awarding compensation for the land being condemned you should bear in mind that you are concerned with the reasonable market value of the land

as of October 22, 1943, and not any future value that the land may hereafter have, since no human tribunal is able to determine what value land may have at some future date.

United States v. First Nat'l Bank, 250 Fed. 299, 301; Brett v. United States, 86 F. 2d (C.C.A. 9) 305, 307. [41]

Instruction No. VIII.

Just compensation does not include speculative elements. While property is to be valued with reference to all the uses to which it is adapted, your consideration of possible future uses of the property should not take in future uses which upon the evidence you find to be remote, speculative and uncertain. [42]

Instruction No. IX.

In determining the just compensation to be paid for the taking of the property in this case, you should not take into consideration any forest holdings in the area owned by the United States, as the needs of the United States can not be considered by you in fixing the fair cash market value of the land condemned. [43]

Instruction No. X.

In determining the just compensation to be paid for the taking of the property in this case, you should not take into consideration any timber owned by anyone except the respondent, Polson Logging Company, as the effect of such timber holding upon the value of this land over which was constructed

a truck logging road is too remote and speculative to have any place in your deliberations, as there was no knowing when or how the timber would be logged or the route over which it would be taken.

Meskill & Columbia River Ry. Co. v. Luedinghaus, 78 Wash. 366, 139 Pac. 52 (1941).

King County v. Joyce, 96 Wash. 520, 165 Pac. 399 (1917). [44]

Instruction No. XI.

Since the respondent is entitled to receive no more than indemnity for his loss, the Polson Logging Company's award cannot be enhanced by any gain to the Government. While you are to determine the fair cash market value, after due consideration of all reasonable uses to which the property could be put, the special value to the Government as distinguished from other users must be excluded as an element of market value. The fact that there is a large stand of national forest timber, which may be logged in the future and hauled out over this road, should not be considered by you. The presence of the truck logging road upon this property is to be given weight in determining the fair cash market value of the property only if you find that a private purchaser would pay more for the land because of the road. [45]

Instruction No. XII.

In determining the just compensation to be paid by the Government to the respondent, you will not take into consideration the truck logging road lo-

cated upon the property condemned, unless you find from the evidence that the existence of said road enhances the fair cash market value of the land taken. The value, if any, of this truck logging road is to be included by you in the total award, only to the extent that you find from the evidence it increased the market value of the land taken. [46]

Instruction No. XIII.

In determining whether any private purchaser would purchase the road in question here for road purposes, you are not to consider the amount which any private purchaser would pay for such road, if the purpose of such private purchaser in purchasing that road was to control timber within the Olympic National Forest. [47]

Instruction No. XIV.

In determining the compensation to be paid by the United States for the taking of this property, you should not consider the value of the land for road purposes, unless you find that it had a value for road purposes to some private purchaser. You cannot allow any value for such road over and above the amount which you believe such private purchaser, acting as a reasonable, prudent and informed man, would pay for it.

If you find that there was no reasonable prospect that the road could be sold to a reasonable, prudent and informed private purchaser for road purposes, then you should not increase the amount of your award because of the existence of the road. [48]

Instruction No. XV.

In determining the weight to be given to testimony relative to the cost of reproducing the road and bridges here in question, new less depreciation, you are first to determine if a reasonably prudent man would purchase or undertake to construct a road at such cost.

If you find that the reproduction cost new, as testified to for the road and bridges taken, is so excessive that no reasonably prudent man would purchase or undertake to construct the road and bridges at such a price, you are to disregard all testimony relative to reproduction cost new, and such testimony is to be given no effect in your determination of the fair cash market value of the property.

United States v. Boston C. C. & New York Canal Co., et al., 271 F. 877.

Re Long Island Lighting Company (N. Y. Public Service Com.), P.U.R. 1922B 1; 37 Harv. L. Rev., (1924) 431, 441, 453, et seq. [49]

Instruction No. XVI.

In determining the just compensation to be paid to the Polson Logging Company, you should not take into consideration the value to the Government, if any, of the truck logging road. The fact that the Government utilized this grade in the construction of the present road in no way serves to increase the compensation to be paid the respondent company and consideration of that circumstance has no place in your deliberations. [50]

Instruction No. XVII.

The just compensation to be paid by the United States for the taking of the property condemned is the fair cash market value as that term has been defined to you in these instructions. However, if you find from the evidence that the fair cash market value of the remainder of respondent's property has been diminished by the taking of a portion of said land, you are to consider the damages, if any, to said remainder in determining the just compensation. This is called severance damage.

In the event that you find from the evidence that the fair cash market value of the remainder of respondent's property has been diminished, you are to determine the just compensation to be paid for the taking of a portion of the respondent's land and damages to the remainder, by determining the fair cash market value of the entire tract immediately prior to the date of taking, and subtracting therefrom the fair cash market value of the remaining land not taken, immediately after the date of taking.

Instruction No. XVIII.

If you find from the evidence that the market value of the remaining property owned by the Polson Logging Company was increased in value by reason of the construction and improvement of this road by the Government and that the increase in value exceeds the damages suffered by the Polson Logging Company, your verdict should be for the Polson Logging Company for nominal damages

only. By nominal damages is meant some small amount as, for example, the sum of $1.00. [52]

Instruction No. XIX.

You are instructed that if you find the fair cash market value of the remaining portion of Polson Logging Company's land will be enhanced or increased by reason of the construction or improving of the highway, for which the lands in question are taken, such increase in market value is a special benefit which you should offset against the just compensation computed according to the instructions heretofore given you. You should offset such benefits notwithstanding you may also find that market value of other lands in that vicinity may also be increased or enhanced by reason of the building of the proposed highway. [53]

Instruction No. XX.

If you find from the evidence that the road as constructed and improved by the Government increases the usefulness of the remaining property of the Polson Logging Company not taken, and enhances its market value, the advantages thus conferred by this road to the remaining property are special benefits and these special benefits should be considered by you in determining the just compensation to be paid for the property taken. [54]

Instruction No. XXI.

You are instructed that in arriving at your verdict in this case, you must not give your assent to, or be a party to, any conclusion and verdict other than or

different from your own, and that you must not arrive at your verdict by resort to the determination of any chance or lot; or by any arbitrary addition of the several amounts of award deemed proper by the several jurors respectively, and by division thereof by the number of such jurors so as to arrive at an average or quotient verdict. Instead, you are instructed that you must bring in as a verdict such amount as ten of you agree upon as your own conclusion and finding. [55]

Instruction No. XXII.

You are instructed that the United States has condemned the land in this case, among other uses, for use as a permanent highway and for use of the people of the United States generally, for all lawful and proper purposes having regard to the geographical, topographical and other conditions of said Olympic National Forest and lands in the vicinity thereof, which affect the welfare, safety and preservation of the Forest.

In determining the just compensation to be paid by the Government to respondent, Polson Logging Company, you should take into consideration the fact that said respondent, Polson Logging Company, has the right to use said highway as a member of the general public.

[Endorsed]: Filed Nov. 19, 1945. [56]

[Title of District Court nad Cause.]

RESPONDENT'S POLSON LOGGING COMPANY'S REQUESTED INSTRUCTIONS

Comes now the respondent, Polson Logging Company, and requests the Court to give to the jury the following instructions numbered 1 to 12.

L. B. DONLEY,
F. D. METZGER,
METZGER, BLAIR &
GARDNER,
Attorneys for Respondents,
Polson Logging Company.

Instruction No. 1

In a proceeding under the power of eminent domain, such as this, there are, under the constitutional provisions of both the State of Washington and the United States, two elements of primary importance. The first is that the right of the Government to take the property of respondent, Polson Logging Company, may be exercised only upon the condition that the Government shall see to it that just compensation for the property so taken, as well as any damages to any remaining property of the respondent by reason of the taking, be ascertained and paid. Accordingly, the burden of proof is upon the petitioner, the United States of America, to establish what amount will constitute just compensation, that is, the petitioner must establish by a fair preponderance of the evidence that the amount contended for by it will constitute just compensation.

The second is that in a constitutional society, such as ours, the fullness and sufficiency of the guarantees which surround the owners of property, whether an individual or a corporation, in the use and enjoyment of such property, constitute one of the most certain tests of the character and value of the government of such a society. So here, the fullness and sufficiency of the security afforded by the State and Federal Constitutions to an owner of property against the arbitrary taking of it by the Government is tested by the action of the jury, to whom is left the ascertainment and determination of the just compensation to be paid the owner. [58]

Instruction No. 2

This trial is solely for the purpose of determining the just compensation that should be paid to the owners, respectively, first, for the property which the United States seeks to take, and second, for the damage, if any, done by reason of such taking to any other or remaining property of the owners. It is your duty to fix and determine that just compensation under the evidence and in accordance with these instructions.

It is your duty to determine the fair cash market value for the property being condemned, and to separately determine the severance damage, if any, to the remaining property. When you have determined these two amounts you will add them together and the entire amount will constitute your verdict. [59]

Instruction No. 3

The owner of property sought to be condemned is entitled to its "market value fairly determined." That value may reflect not only the use to which the property was devoted at the time as of which the market value is to be determined, but also that use to which it may be readily converted. In that connection, the value of the property is not to be measured merely by the use to which it is or can be put as a separate tract, but you must consider and determine that value in the light of any special or higher use for which the property in question may be available in connection with other properties, if you find from the evidence that there is a reasonable probability of such connection in the reasonably near future. [60]

Instruction No. 4

"Just compensation" includes all the elements of value that inhere in the property and corresponds to the full, fair cash market value thereof, fairly determined. Ordinarily, market value means the price property will bring in the market. The term "market" presupposes some competition between buyers on the one hand and sellers on the other. It implies that there are several possible buyers so that the seller is not limited to a single buyer if he is to make a sale, and likewise that there are several possible sellers of similar property so that the buyer is not restricted to a single seller, but can weigh the respective merits of the properties offered. Accordingly, "market value" is the amount or price which

would be arrived at as of October 22, 1943, and under such conditions by fair negotiations between an owner willing to sell, but free to sell or to refuse to sell as the price suited, and a purchaser desiring, but under no necessity, to buy. Therefore, in determining the just compensation to be paid the owner, you should take into account all considerations, so far as shown by the evidence, which you believe might fairly be brought forward and reasonably given weight by well informed persons engaged in such bargaining. [61]

Instruction No. 5

In determining the value of property appropriated for public purposes, the same considerations are to be regarded and given weight as would be in the case of a sale of property between private parties. In other words, you are to determine from the evidence submitted in this case what a willing buyer having the means so to do would pay in cash to a seller who was willing, but under no necessity, to sell. Your inquiry must be: What would the property bring in cash if sold as the result of such negotiation? In determining such value, the property is to be viewed not merely with reference to the uses to which it was at the time in question applied, but with reference to the uses to which it is plainly adapted; that is to say: What is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or be regarded as valueless because the owner at the particular time is not actually putting

it to its most valuable use or even unable to put it for the time being to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life or business. Its capability of being made thus available gives it a market value, which you must determine. [62]

Instruction No. 6

"Just compensation," under both the State and Federal Constitutions, does not mean inadequate compensation but rather means the full and perfect equivalent in money of the property taken or damaged by or in the name of the State. To give to an owner the full and perfect equivalent of the property taken from him or damaged in the taking, means that upon the receipt of the compensation awarded by the jury's verdict he shall be put in as good a position pecuniarily as he would have occupied if his property had not been taken and will not be poorer by reason thereof. [63]

Instruction No. 7

Ordinarily "market value" is established by actual sales of similar property currently made in a free and open market. However, properties such as those involved here have no established market price because of the absence of sufficient current or recent sales. Accordingly, resort must be had to other data to ascertain and determine that value. [64]

Instruction No. 8

In arriving at the value of the property involved in this case, it is essential that the jury consider the

character, nature and extent of the improvements and the uses to which the land in its improved state may be put. The jury should consider whether the property is adapted to the particular uses claimed for it and whether it is or it is not profitable and valuable for such uses. Whether property is profitable and valuable for a particular use is always a controlling consideration in determining the value of the property itself. [65]

Instruction No. 9

In determining the amount of just compensation to be awarded, the proper inquiry is "What has the owner lost?" and not "What has the taker gained?". You should not consider the need, if any, of the government for the property taken, or the value of such property to the government upon acquisition. The utility or availability of the property for the special purpose of the government cannot be considered if the government is the only party who can use the property for that purpose. However, if you find the property has a special utility or availability not only to the government but to other parties who could use the property for the particular purpose of use intended by the government, then this utility or availability for use should be considered by you.

United States vs. Canal Co., 271 Fed. 877, 893; Grand Hydro vs. Grand River Dam Authority, (Okla.) 139 Pac. (2d) 798, 801. [66]

Instruction No. 10

The market value of property is determined by

taking into account the highest possible use to which the property is or may reasonably be put or be adapted and what purchasers would be willing to pay for it and owners accept for it in view of such highest possible use. In determining market value the special adaptability or availability of property for the use for which it is taken may be shown and taken into account if such adaptability or availability would increase the value of the property in the eyes of purchasers generally in the open market quite apart from the necessities or needs of the particular condemnor.

Metropolitan Water District vs. Adams, 116 Pac. (2d) 7, 17. [67]

Instruction No. 11

In eminent domain proceedings the award of just compensation must be measured by the actual property and legal property rights taken from the owner and not by the use which the taker may make of the property taken. Damages must be assessed in this proceeding once and for all. The amount of those damages cannot be diminished by any expectation or possibility that the government may at some future time or from time to time permit the respondent to use the property taken either gratuitously or upon payment of some charge for such use.

State ex rel Polson Logging Company vs. Superior Court, 11 Wash. (2d) 545, 119 Pac. (2d) 694; United States vs. Oakland Hotel, 53 Fed. Supp. 767. [68]

Instruction No. 12

You should consider the care and accuracy with which the various experts respectively determined the data upon which they base their conclusions. If one or more of the experts seemed to the jury to use more specific and accurately obtained data for their estimates and to give more satisfactory reasons for their conclusions, the jury may give more credence to that expert or those experts and his or their conclusions. You are not bound by any expert testimony but it should be considered by you in connection with the other evidence in the case.

[Endorsed]: Filed Nov. 19, 1945. [69]

[Title of District Court and Cause.]

ADDITIONAL INSTRUCTION REQUESTED BY RESPONDENT POLSON LOGGING COMPANY

Comes now Respondent, Polson Logging Company, a corporation, and requests that the Court give to the Jury in this case the following additional instruction numbered 13.

L. B. DONLEY,
F. D. METZGER,
METZGER, BLAIR & GARDNER,
Attorneys for Respondent
Polson Logging Company.

Instruction No. 13

The jury are instructed that in determining the just compensation to be paid respondent Polson Logging Company, they are to take into consideration the nature and extent of the property of respondent, with the improvements thereon, in the condition in which it was on Oct. 22, 1943, what it would have cost to reconstruct or reproduce said property and such improvements at that date, the depreciation which had accrued at said date in said property, the timber which was rendered accessible or was tributary to and which the jury believe from the evidence will in reasonable probability be transported thereover, the revenue which said respondent has heretofore derived from the use of such prop-rty for the transportation of logs and timber products together with the revenue which they believe it is reasonably probable that said respondent would have derived in the future, and any and all other factors which the jury believe would be given consideration and weight in bargaining for the sale and purchase of such property between purchasers willing and able but not compelled to buy, on the one hand, and sellers willing but not compelled to sell, on the other.

[Endorsed]: Filed Nov. 19, 1945. [71]

RECORD OF PROCEEDINGS:

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma, in the Southern Division thereof on the

20th day of November, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 20th day of November, 1945, this cause comes on before the court for further trial. F. P. Keenan and A. L. Stella, represent the government and F. D. Metzger and A. E. Blair represent the respondent. All jurors, counsel and parties present. Trial is resumed. Respondent Witness Blain H. McGillicudy resumes the witness stand and further testifies. Respondent Witness Frank D. Hobe sworn and testifies.

At 11 a.m. Court recessed. At 11:20 court is again in session. All jurors, counsel and parties present. Trial is resumed. Respondent Witness Frank D. Hobe resumes the witness stand and further testifies. Respondent Witness Len Forrest recalled and further testifies.

At 11:55 the jurors are excused until 1:30. In the absence of the jurors, Mr. Blair on behalf of respondent makes offer of proof by Respondent Witness Frank Hobe. Objections by Petitioner sustained and offer denied. Mr. Metzger on behalf of respondent makes offer of proof by Respondent Witness Len Forrest. Objections of petitioner sustained and offer denied. Respondent [72] Exhibit A-14 marked and offered. Objections of petitioner sustained and exhibit not admitted.

At 12:10 court recessed until 1:30 p.m. At 1:30 p.m. court is again in session. All jurors, counsel and parties present. Trial is resumed. At 1:35 the respondent rests. Opening argument by Mr. Keenan. Respondents waive argument to jury.

At 2:05 court recessed 25 minutes. At 2:40 p.m. court is again in session. All jurors, counsel and parties present. Charge to the jury by the court. Bailiffs are sworn on taking charge of the jury. At 3:10 the jurors retire to deliberate. Exceptions to the court's instructions by the petitioner in not giving Petitioner Instructions Nos. 22 and 5 and the court's instruction that the jury's decision must be unanimous. Exception to the Court's instructions by Respondent in its failure to give Respondent Instructions Nos. 3, 8, 9, 11 and 13. Exceptions to the above instructions allowed by the court.

At 4:50 court is again in session. All jurors, Counsel Metzger, Keenan and Stella present. Jury Foreman Ora Murray states that the jury has arrived at a verdict, which is read by the clerk as follows:

We, the jury empanelled and sworn to determine the just compensation to be paid for the taking of the fee simple title to that certain property referred to in the above-entitled case as Line A, B (except that portion of Line B which is in Sec. 16, & 21 N, R 9W, W.M.), C, D, F, G, H, I, J, K, and L and Tracts 1, 2 and 3 as shown in Petitioner's Exhibit 2, in this case, and for the Right of Way of the Polson Logging Co., along said Line B [73] in Sec.

16, T 21 N, R 9 W, W.M., do find the amount of such just compensation to be Six Thousand Five Hundred Dollars ($6,500).

Dated at Tacoma, Washington, this 20th day of November, 1945.

/s/ ORA L. MURREY.

Jurors are polled and each answer affirmatively. Jurors are excused until notified to appear. [74]

[Title of District Court and Cause.]

VERDICT

We, the jury, duly empanelled and sworn to determine the just compensation to be paid for the taking of the fee simple title to that certain property referred to in the above-entitled case as Lines A, B (except that portion of Line B which is in Sec. 16, T 21 N, R 9 W, W.M.), C, D, F, G, H, I, J, K and L, and Tracts 1, 2 and 3, as shown on Petitioner's Exhibit No. 2 in this case, and for the Right-of-Way of the Polson Logging Co along said Line B in Sec. 16, T 21 N, R 9 W, W.M., do find the amount of such just compensation to be Six Thousand Five Hundred Dollars ($6,500).

Dated at Tacoma, Washington, this 20th day of November, 1945,

/s/ ORA L. MURREY,
Foreman.

[Endorsed]: Filed Nov. 20, 1945. [75]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Comes now Respondent Polson Logging Company and moves the Court to set aside the verdict returned and received herein and grant a new trial, for the following cause materially affecting the substantial rights of said Respondent, to-wit:

Error in law occurring at the trial.

The particular error or errors relied upon are as follows:

1. The denial of Respondent's motion to quash and adjudge null and void the Third Declaration of Taking, dated November 2, 1943, and filed herein November 12, 1943.

2. The granting of the Government's motion for the entry of judgment on said Third Declaration of Taking and the entry of judgment thereon on May 23, 1944.

3. The modification of the Court's order made and entered November 12, 1943, made by the Court on its own motion in its order made and entered May 23, 1944.

4. The confirmation by the judgment entered May 23, 1944, on the Third Declaration of Taking of whatever possession was taken on or about February 5, 1942, under and pursuant to the judgment entered January 23, 1942 on the original Declaration of Taking filed in this cause.

5. The denial of Respondent's motion to quash

and adjudge [76] null and void the Third Declaration of Taking filed November 12, 1943, and to vacate the judgment entered thereon on May 23, 1944.

6. The granting of Petitioner's Motion to Amend said Third Declaration of Taking as to the description of the property therein designated as Line F.

7. The fixing of October 22, 1943, as the date as of which the value of the property of respondent is to be determined.

8. Denial of Respondent's motion to dismiss and strike Petitioner's Second Amended Petition in Condemnation, verified May 1, 1944, and filed May 23, 1944, and the overruling of Respondent's demurrer to said Second Amended Petition.

9. Denial of Respondent's motion to strike from said Second Amended Petition in Condemnation all references to the property therein described as Tracts 2 and 3 and the refusal to dismiss the proceedings as to said Tracts 2 and 3 or to wholly eliminate said Tracts from the proceeding.

10. The exclusion of all evidence of valuation which was in any way based upon or took into consideration the timber in the Olympic National Forest which might reasonably be expected to be removed over the lands and roads being condemned, irrespective of whether such timber belonged to the United States or to third parties.

11. The exclusion of all evidence of valuation which was in any way based upon or took into consideration the timber of third parties, whether with-

in or without the Olympic National Forest, which might reasonably be expected to be removed over the lines and roads being condemned.

12. The striking of the evidence of the witness McGillicudy as to market value of the property of Respondent.

13. The refusal of the offer of proof by the witness Hobi [77] of the market value of Respondent's property.

14. The refusal of the offer of proof by the witness Forrest of the rate of removal of the timber belonging to the United States within the Olympic National Forest, established or determined by the United States National Forest Service.

15. The exclusion from evidence of the Third Declaration of Taking, exclusive, however, of Paragraph 5 thereof, which Declaration was dated November 2, 1943 and filed herein November 12, 1943.

16. The refusal of Respondent's requested Instruction No. 3, and particularly the failure of the Court to instruct the jury that they are to consider and determine the market value of Respondent's property in the light of any special or higher use for which it may be available in connection with any other properties if they should find from the evidence that there is a reasonable probability of such connection in the reasonably near future.

17. The refusal of Respondent's requested Instruction No. 8.

18. The refusal of Respondent's requested Instruction No. 9, and particularly the refusal or failure of the Court to charge the jury as requested in said instruction that if they find Respondent's property has a special utility or availability, not only to the Government but to other parties who could use the property for the particular use intended by the Government, then such utility or availability or use should be considered by them.

19. The refusal of Respondent's requested Instruction No. 11, and particularly the refusal of the Court to charge the jury that damages must be assessed in the current proceeding [78] once and for all, as set forth in said requested instruction.

20. The refusal of Respondent's requested Instruction No. 13, and particularly the failure and refusal of the Court to charge the jury that in determining just compensation, they were entitled to take into consideration the timber which was rendered accessible by or was tributary to the Respondent's property and which the evidence showed will in reasonable probability be transported thereover, and the revenue heretofore derived from the use of such property for the transportation of logs and other timber products thereover, together with the revenue which they believe it is reasonably probable would be derived in the future.

21. The failure and refusal of the Court to instruct the jury as to the specific factors or elements which were to be taken into consideration by them

in determining the market value of respondent's property.

22. Instructing the jury, and by frequent reiteration unduly emphasizing, that in determining the just compensation to be awarded Respondent, the jury should not take into consideration any timber belonging to the United States nor any toll or charge that might be made for the transportation of timber or other property belonging to the United States or for the transportation of timber removed by third parties from lands of the United States within the Olympic National Forest, or take into consideration any value that might result from the hauling or transportation of Government timber or other property over the lands and roads of Respondent.

23. Instructing the jury that in determining just compensation they were not to take into consideration any potential use to which the United States might put the property being [79] condemned, irrespective of whether such use was one to which the property had already been put by Respondent or to which it could be put in the future by Respondent or third parties.

24. Instructing the jury that in determining just compensation they were not to take into consideration any timber except that owned by Respondent.

25. Instructing the jury that the United States acquired full fee title to the lands and property described in the Second Amended Petition in Condemnation on October 22, 1943.

This motion shall be heard upon the pleadings and papers on file and the minutes of the Court, and all other records in the cause.

L. B. DONLEY,
F. D. METZGER,
METZGER BLAIR &
GARDNER,
Attorneys for Respondent,
Polson Logging Company

(Acknowledgment of Service.)

[Endorsed]: Filed Nov. 23, 1945. [80]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 3rd day of December, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.

Now on this 3rd day of December, 1945, this cause comes on for hearing on motion for new trial. F. P. Keenan and A. L. Stella represent the government. F. D. Metzger and A. E. Blair represent the defendant. Argument on motion for new trial by Mr. Metzger. Rebuttal argument by Mr. Keenan. The court now denies motion for new trial and allows an exception to the defendant. Written order to be presented later. [81]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the 17th day of December, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 17th day of December, 1945, in the above cause, A. L. Stella, Spec. Atty. Dept. of Justice represents the government and F. D. Metzger represents the defendant. Order denying motion for new trial is signed by the court and filed. Mr. Stella presents Judgment on the verdict for the court's signature. Mr. Metzger presents Judgment on the verdict for the court's signature. The court suggests changes in each Judgment and states that the final Judgment on the verdict may be presented on Wednesday, December 20 at 2 p.m.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This matter having come on regularly for hearing on December 3, 1945, on motion of respondent, Polson Logging Company, for a new trial, the petitioner, United States of America, being represented

by F. P. Keenan, Special Assistant to the Attorney General, and Anthony L. Stella, Special Attorney, Department of Justice, the respondent, Polson Logging Company, a corporation, being represented by F. D. Metzger and A. E. Blair, of Metzger, Blair & Gardner, its attorneys, and the Court having heard the arguments of counsel for both parties, and being fully advised in the new premises,

Now, Therefore, It Is Hereby Ordered that respondent's motion for a new trial and to set aside the verdict returned and received in this case be and it is hereby denied.

The respondent, Polson Logging Company, a corporation, excepts to the entry of this order and its exception is hereby allowed.

Done in Open Court this 17th day of December, 1945.

CHARLES H. LEAVY,
United States District Judge.

Presented by:

ANTHONY L. STELLA,
Special Attorney, Department of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Dec. 17, 1945. [83]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the

19th day of December, 1945, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 19th day of December, 1945, this cause comes on for hearing on presentation of proposed Judgment on the Verdict. A. L. Stella, Special Attorney Department of Justice, represents the government. F. D. Metzger represents the defendant. Mr. Stella presents proposed Judgment. Mr. Metzger presents proposed Judgment. Argument on proposed Judgment by Mr. Metzger and Mr. Stella. The court now signs Judgment on the verdict which is filed. [84]

In the District Court of the United States for the Western District of Washington, Southern Division

No. 323

UNITED STATES OF AMERICA,

Petitioner,

vs.

POLSON LOGGING COMPANY, a corporation, et al.,

Respondents.

JUDGMENT ON THE VERDICT

This Matter having come on regularly for hearing and trial on November 12, 1945, before the un-

dersigned Judge of the above entitled Court, the petitioner, United States of America, being represented by F. P. Keenan, Special Assistant to the Attorney General, and Anthony L. Stella, Special Attorney, Department of Justice, the respondent, Polson Logging Company, a corporation, being represented by F. D. Metzger and A. E. Blair, of Metzger, Blair & Gardner, its attorneys, and no other respondent appearing at the trial, a jury having been duly impaneled and sworn to determine the just compensation to be paid for the taking of the property more particularly described in Exhibit "A" hereto attached, witnesses having been sworn and testimony having been taken and the jury having on November 20, 1945, returned its verdict finding the just compensation to be paid for the taking of said property as of October 22, 1943, to be the sum of $6,500.00, and the respondent's motion for new trial having been denied, and it appearing to the Court that on January 21, 1942, the sum of $8,280.00 was deposited in the registry of the Court as estimated just compensation for the taking of perpetual easement and right of way, more particularly described in the Petition in Condemnation and Declaration of Taking filed herein on January 21, 1942, in a portion of the property, [85] described in said Exhibit "A", and on October 22, 1943, an additional sum of $688.00 was deposited in the registry of the Court making a total sum deposited of $8,968.00 as estimated just compensation for the taking of the full fee simple title to said property, and it further appearing to the Court that the United States of

America entered into possession of that portion of the property condemned in this action designated as Lines A, B, C, D and G, on February 5, 1942, and entered into possession of the remainder on October 22, 1943, and the Court being fully advised in the premises,

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the verdict of the jury finding and adjudging that the sum of Six Thousand Five Hundred Dollars ($6,500.00), is the just compensation to be paid for the taking of the property referred to in the above entitled cause as Lines A, B (except that portion of Line B which is in Section 16, T. 21 N., R. 9 W., W.M.), C, D, F, G, H, I, J, K and L, and Tracts 1, 2 and 3, and for the right of way of the Polson Logging Company along said Line B in Section 16, T. 21 N., R. 9 W., W.M., which property is more particularly described in Exhibit "A" attached hereto and by this reference made a part hereof, be and said verdict is hereby approved and confirmed.

2. That the total amount of damages, including the full and fair value of said property appropriated resulting to the persons and parties interested therein by reason of the taking, appropriation, and possession of said property from February 5, 1942, as above set forth, by the United States of America, and the just compensation for the taking thereof is the sum of Six Thousand Five [86] Hundred Dollars ($6,500.00), without interest, which sum of Six Thousand Five Hundred Dollars ($6,500.00) is the

full, final and complete compensation to be paid by the United States of America for the taking of this property and for and all claims of damage against the petitioner arising out of the condemnation proceeding.

3. That the Clerk of the above-entitled Court is hereby ordered to disburse the sum of Six Thousand Five Hundred Dollars ($6,500.00), without interest, from the registry of this Court, as follows:

To: Polson Logging Company, a corporation, $6,500.00

4. That title to the property taken is vested in the United States of America free and clear of any and all charges, interest, claims, taxes, liens and encumbrances of any kind or character whatsoever.

The Respondent, Polson Logging Company, a corporation, excepts to the entry of this judgment and its exception is hereby allowed.

Done in Open Court this 19th day of December, 1945.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented by:

ANTHONY L. STELLA,
Special Attorney,
Department of Justice.

(Acknowledgment of Service attached.)

Respondent Polson Logging Company, a corporation, duly excepted to the signing and entry of the foregoing judgment and to each and every part thereof, and particularly excepted, [87] (a) to the

recital or finding as to the taking of possession, upon the ground that such finding or recital is improper and was not in issue herein; (b) to so much of said judgment as confirms the verdict of the jury and decrees the just compensation to be the sum of $6,500.00, upon the ground that all evidence as to a material element in determining such just compensation was erroneously excluded and the jury were not permitted to take into consideration such element in arriving at just compensation; and (c) to that portion of said judgment decreeding that title is vested in the United States of America, upon the ground that no authority for such taking was pleaded or proven; and Respondent's said exceptions were and are hereby allowed, and (d) to the finding or recital as to the taking of possession of portions of the lands on February 5, 1942, and of the remainder on October 22, 1943, because unfounded in fact and erroneous in law.

CHARLES H. LEAVY,
United States District Judge.

(Acknowledgment of Service attached.) [88]

EXHIBIT "A"

Those certain lands located in Grays Harbor County, Washington, referred to in this cause as Tracts 1, 2 and 3, Lines A, B, C, D, F, G, H, I, J, K and L, all in Township 21 North, Ranges 9 and 10 West of the Willamette Meridian, being more particularly described as follows:

Here follows detailed description of the lands con-

demned which were owned by appellant, Polson Logging Company, which description of Lines A, B, C, D, F, G, H, I, J, K and L, and Tracts 1, 2 and 3, is identical with the description of said lands appearing in Paragraph III of the Amended Petition in Condemnation filed October 22 1943 (printed transcript of record on former appeal, Cause No. 10870, pages 49 to 57), as amended by order of the District Court, entered June 7, 1944 (printed transcript of record on former appeal, Cause No. 10870, page 129), and by order of the District Court amending Declaration of Taking and subsequent pleadings entered September 20, 1945 (Item 31 of appellant's designation of contents of record on appeal), except for the following words which appear after the description of Line B in the Judgment on the Verdict entered December 19, 1945:

Excepting that portion of Line "B" which lies within Section 16, Township 21 North, Range 9 West Willamette Meridian which was vested in the State of Washington as more particularly shown on the map attached to the Declaration of Taking filed herein on October 22, 1943, but including the right of way of the Polson Logging Company along said Line "B" in said Section 16, Township 21 North, Range 9 West Willamette Meridian.

[Endorsed]: Filed Dec. 19, 1945.

[Title of District Court and Cause.]

MOTION

Comes Now the United States of America through its attorney of record, Anthony L. Stella, Special Attorney, Department of Justice, and moves the Court for an order directing the Clerk of the Court to cancel the check issued to the Polson Logging Company, in the above entitled matter on the 21st day of December, 1945, and to reissue same upon further order of the Court. This motion is based upon the fact that on the 15th day of January, 1946, Check No. 5,383 dated December 21, 1945, payable to Polson Logging Company, a corporation, in the sum of $6,500.00, in payment of Judgment in the above entitled cause, issued by the Clerk of the Court, was tendered to Metzger, Blair and Gardner, attorneys for Polson Logging Company; that said attorneys refused to accept said check stating that an appeal will be taken from the Judgment entered in this cause.

Dated this 17th day of January, 1946.

/s/ ANTHONY L. STELLA,
Special Attorney, Department of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Jan. 18, 1946. [93]

RECORD OF PROCEEDINGS

At a regular session of the United States District Court for the Western District of Washington, held at Tacoma in the Southern Division thereof on the

18th day of January, 1946, the Honorable Charles H. Leavy, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Journal record of said Court:

[Title of Cause.]

Now on this 18th day of January, 1946, in the above matter, A. L. Stella, Special Attorney Department of Justice, represents the government and files motion for Order returning check to the clerk. Order directing Clerk to cancel check signed by the court and filed. [94]

[Title of District Court and Cause.]

ORDER

This matter coming on for hearing this day upon the Motion of the petitioner, United States of America, through its attorney of record, Anthony L. Stella, Special Attorney, Department of Justice, for an order directing the Clerk of this Court to cancel Check No. 5,383 dated December 21, 1945, payable to the order of Polson Logging Company, a corporation, in the sum of $6,500.00 and to reissue the same upon further order of this Court. It appearing to the Court that said check was tendered to Metzger, Blair and Gardner, attorneys for Polson Logging Company, a corporation, on the 15th day of January, 1946, in payment of Judgment entered herein in favor of the respondent, Polson Logging Company, a corporation, in said amount, and respondent through its attorneys, Metzger, Blair and Gardner,

having refused to accept the tender of said check for the reason that it will appeal from the Judgment entered herein; and the Court being fully advised in the premises; now, therefore, it is hereby

Ordered that the Clerk of this Court be and he is hereby directed to cancel Check No. 5,383 dated December 21, 1945, payable to Polson Logging Company, a corporation, in the sum of $6,500.00, subject to reissue upon the further order of this Court.

Done in Open Court this 18th day of January, 1946.

CHARLES H. LEAVY,
United States District Judge.

Presented by

ANTHONY L. STELLA,
Special Attorney, Department of Justice.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Jan. 18, 1945. [95]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Polson Logging Company, a Washington corporation, one of the respondents above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that certain judgment entitled "Judgment on the Verdict," made and entered in the above entitled Court and cause on December 19, 1945, and from each and every part and the whole thereof, and

for greater certainty also appeals from that certain judgment entitled "Judgment on Declaration of Taking," made and entered in the above entitled Court and cause on May 23, 1944, and from each and every part and the whole thereof.

Dated at Tacoma, Washington, this 16th day of March, 1946.

L. B. DONLEY,
F. D. METZGER,
Attorneys for Appellant.
METZGER, BLAIR, GARDNER & BOLDT,
Of Counsel for Appellant.

(Affidavit of Service by Mail attached.)
[Endorsed]: Filed March 18, 1946. [96]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents, That we, Polson Logging Company, a Washington corporation, a respondent herein, as principal, and Hartford Accident and Indemnity Company, a corporation organized under the laws of the State of Connecticut and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto the United States of America, petitioner herein, in the full and just sum of Two Hundred Fifty Dollars ($250.00) lawful money of the United States, for the payment of which sum well and truly to be made to said petitioner we hereby bind ourselves, our successors and assigns, jointly and severally by these presents.

The condition of this obligation is such that whereas in the above entitled court and cause a judgment entitled "Judgment on Declaration of Taking" was made and entered on May 23, 1944, and a further judgment entitled "Judgment on the Verdict" was made and entered on December 19, 1945, and said respondent Polson Logging Company is about to file with said District Court of Appeals for the Ninth Circuit from said Judgment on Declaration of Taking entered May 23, 1944, and from said Judgment on the Verdict entered December 19, 1945, and from each and every part [98] and from the whole of said judgments;

Now, Therefore, the condition of this obligation is such that if said Polson Logging Company shall pay all costs if said appeal is dismissed or said judgment affirmed or such costs as the appellate court may award if said judgment is modified, then the above obligation to be void, otherwise to remain in full force and effect.

In Witness Whereof, the above bounden principal and surety have executed the foregoing bond this 18th day of March, 1946.

POLSON LOGGING COMPANY,
By /s/ L. B. DONLEY,
/s/ F. D. METZGER,
Its Attorneys of Record.

[Seal] HARTFORD ACCIDENT AND INDEMNITY COMPANY,
By /s/ HAROLD N. MANN,
Its Attorney in Fact. [99]

State of Washington,
Sounty of Pierce—ss.

On this 18th day of March, 1946, personally appeared before me Harold N. Mann, to me known to be the Attorney-in-Fact of Hartford Accident and Indemnity Company, the corporation that executed the within and foregoing instrument, as surety, and acknowledged said instrument to be the free and voluntary act and deed of said Hartford Accident and Indemnity Company for the uses and purposes therein mentioned and on oath stated that he was authorized to execute the same for and on behalf of said corporation, and that the seal affixed thereto is the corporate seal of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] /s/ VIVIAN PARENT,
Notary Public in and for the State of Washington, residing at Tacoma.

[Endorsed]: Filed March 18, 1946. [100]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKETING APPEAL

Polson Logging Company, a corporation, one of the respondents herein, having filed notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered

herein December 19, 1945, together with bond for costs on appeal, and having applied for an extension of time within which to file the record on appeal and docket said appeal in the Circuit Court of Appeals for the Ninth Circuit, and good cause appearing for the extension so applied for,

It Is Ordered that the time for filing the record on appeal and docketing the action in said Circuit Court of Appeals be and is hereby extended to and including June 1, 1946.

It Is Further Ordered that said appellant Polson Logging Company, a corporation, shall have and is hereby allowed to and including April 15, 1946, within which to serve and file its designation of the portions of the record, proceedings and evidence herein to be contained in the record on appeal and its statement of the points on which it intends to rely on such appeal.

Done in open court this 18th day of March, 1946.

/s/ CHARLES H. LEAVY,

Judge.

Presented by:

F. D. METZGER.

[Endorsed]: Filed Mar. 18, 1946. [101]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now the appellant, Polson Logging Company, and states that on the appeal of the above entitled cause it intends to rely on the following points:

1. Appellant reaffirms and makes part hereof by this reference the eight points set forth in the "Statement of Points upon which Appellant Intends to Rely on Appeal" made and filed on the former appeal (Cause No. 10870 in the Circuit Court of Appeals for the Ninth Circuit) and found on page 120 of the printed record of transcript on that appeal, which, briefly reiterated, are:

(a) It is a condition precedent to the exercise of the power of eminent domain at the instance of an officer of the United States that Congress expressly grant the power to such officer or authorize him to procure for public uses the property sought to be condemned.

(b) None of the Declaration of Taking filed herein disclose the prerequisite grant of power or authority, and in fact both were wholly wanting.

(c) The order of the District Court of November 12, 1943, is res adjudicata as to the absence of the prerequuisite [102] power or authority under the statutes set out and relied on in the first and second Declarations of Taking.

(d) The United States by pleading over acquiesced in and is bound by the order of November 12, 1943, as to the absence of power under the statutes set out in and relied on under the first and second Declarations of Taking.

(e) The District Court was without jurisdiction in a subsequent term of that court to vacate or modify its order of November 12, 1943.

(f) The third Declaration of Taking filed November 12, 1943, does not disclose any grant of power or authority to exercise the power of eminent domain and in fact both were wholly wanting.

(g) The District Court erred in that portion of the judgment entered May 23, 1944, on the Declaration of Taking filed November 12, 1943, insofar as it purported to confirm a possession taken by the United States on or about February 5, 1942.

(h) That in any event there is no power or authority in the Secretary of Agriculture or the Under-Secretary of Agriculture to procure or acquire the lands designated as Tracts Two and Three.

2. If there has been any valid taking of appellant's property, which is denied, it was in no event prior to the filing of the third Declaration of Taking on November 12, 1943, and accordingly the District Court erred, to the prejudice of appellant:

(a) In its order of September 24, 1945, fixing October 22, 1943, as the date of valuation.

(b) In instructing the jury:

> "You are instructed as a matter of law that it (the Government) acquired fee simple title to the property on October 22, 1943." [103]

3. There was in any event no valid taking of Tracts Two and Three because there was no evidence that said property was used or useful for the proposed purpose for which taken.

4. That in determining the value of or compensation to be paid for property taken by eminent domain the property is to be valued with reference to the uses to which it has been applied and its capacity for other uses, including its special availability or adaptability for the use for which it is taken, and accordingly the District Court erred, to the prejudice of appellant:

(a) In ruling and instructing the jury that in determining compensation they could not take into consideration the large stand of National Forest timber to be logged in the future and hauled out over this road or any timber owned by anyone except the appellant, or any earnings that might be derived if the property had not been taken, from the transportation of timber of the National Forest or of third parties thereover.

(b) In striking the testimony of appellant's witness McGillicudy as to market value of the property taken.

(c) In denying the offer of proof by appellant's witnesses Reynolds and McGillicudy that informed

persons in the position of prospective buyers and sellers negotiating for this property would have taken into consideration and given value to the property taken because of the reasonable prospect that the timber in the Olympic National Forest would be sold to private loggers and in all probability would be moved to market over the property sought to be condemned, and that such loggers would pay the reasonable value of the use of the road for that purpose. [104]

(d) In sustaining objections to the opinion of Mr. Hobe as to the market value of the property being condemned, taking into consideration the Government-owned timber in the Olympic National Forest to the north, and to his opinion as to such market value, excluding from consideration the Government-owned timber but including privately-owned timber within the Olympic National Forest to the north of the roads under condemnation, and in denying the offer of proof by said witness that the market value of the property under condemnation, taking into consideration that it provides the practicable route for the removal of approximately one and one-half billion feet of timber in the Humptulips watershed of the Olympic National Forest, that the Forest Service contemplated and it was a reasonable expectation that said timber would be logged at the rate of twenty million board feet per year and that another road into that timber could be built but would be more expensive to construct and operate, and all other factors which in his opinion would be

given consideration by informed buyers and sellers, was $300,000.00.

(e) In refusing the testimony of appellant's witness Forrest as to the use to be made by the United States Forest Service of the roads under condemnation, and in refusing to admit in evidence the instrument marked for identification "Respondent's Exhibit A-14", and denying the offer of proof by said witness that the United States Forest Service planned and proposed to sell for cutting and removal by means of the road under condemnation not less than twenty million board feet per year of timber in the Humptulips River watershed. [105]

(f) In refusing appellant's requested Instructions Nos. 3, 9 and 13.

Dated this 15th day of April, 1946.

L. B. DONLEY,
F. D. METZGER,
METZGER, BLAIR, GARDNER & BOLDT,
Attorneys for Appellant,
Polson Logging Company.

[Endorsed]: Filed April 15, 1946. [106]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

Whereas, Polson Logging Company, one of the respondents herein, did heretofore on March 18,

1946, give notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment entered herein on December 19, 1945, and from the whole and every part thereof and for greater certainty also appealed from the Judgment on the Declaration of Taking entered May 23, 1944, and has served and filed its designation of the record on appeal, dated April 15th, 1946, together with its statement of the points upon which it intends to rely upon said appeal; and

Whereas, Items 1 to 27, inclusive, of said designation the record on appeal are identical with the correspondingly numbered items of the designation of the record on a former appeal dated July 15, 1944, which were on September 6, 1944, certified by the Clerk of the above entitled court as part of the record of Polson Logging Company's appeal from the judgment entered May 23, 1944, on the Declaration of Taking and forwarded to said Circuit Court of Appeals for the Ninth Circuit; and

Whereas, Item 28 of the designation of the record on appeal dated April 15, 1946, is identical with the additional matter designated by the United States of America to be contained and [107] which was contained in the record on the former appeal; and

Whereas, the record on said former appeal is now on file in and has been printed as the transcript of record in cause No. 10870 of the records of said Circuit Court of Appeals, and the duplication thereof in the record of the appeal now pending is deemed unnecessary;

It Is Stipulated and Agreed by and between the undersigned attorneys of record and counsel for Polson Logging Company, respondent-appellant, and the United States of America, petitioner, appellee, respectively, that the transcript, together with the original reporter's transcript of proceedings of October 29, 1943, November 6, 1943, and May 19, 1944, and the original condensed statement of testimony certified by the Clerk of the above entitled court September 6, 1944, as the transcript of the record on appeal from the judgment entitled "Judgment on Declaration of Taking" made and entered on May 23, 1944, shall, to the extent of Items 1 to 28, inclusive, constitute part of the record on the appeal of Polson Logging Company pursuant to notice of appeal dated March 16, 1946, and need not be reproduced therein but may be certified as part of such record by reference to the record on the former appeal.

Dated this 15th day of April, 1946.

/s/ L. B. DONLEY,
/s/ F. D. METZGER,
/s/ METZGER, BLAIR, GARDNER & BOLDT,
Attorneys for Polson Logging Company, Respondent-Appellant.

/s/ F. P. KEENAN,
Attorney for United States of America, Petitioner-Appellee.

[Endorsed]: Filed April 15, 1946. [108]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellant, Polson Logging Company, hereby designates the following as the portions of the record, proceedings and evidence in this cause to be contained in the record on appeal, namely:

1. Certified copy of the letter of the Secretary of Agriculture to the Attorney General of the United States, filed January 21, 1942.

2. The petition in condemnation filed January 21, 1942.

3. The declaration of taking, with map attached, executed by the Secretary of Agriculture January 10, 1942, and filed herein January 21, 1942.

4. The judgment of the District Court on said declaration of taking, made and entered herein January 23, 1942.

5. The Clerk's certificate as to the deposit of $8,280.00, filed January 23, 1942.

6. The original notice and summons filed January 30, 1942.

7. United States Marshal's return of service of notice and petition on Polson Logging Company, filed February 1, 1942.

8. Motion of Polson Logging Company to vacate the judgment on the declaration of taking entered Jan. 23, 1942, which motion was filed February 21, 1942. [109]

9. The demurrer, motion to dismiss and to strike, of Polson Logging Company, filed March 30, 1942.

10. Certified copy of the letter of the Secretary of Agriculture, dated April 21, 1942, to the Attorney General of the United States, filed October 22, 1943.

11. Amended petition in condemnation filed October 22, 1943.

12. The declaration of taking, with map attached, executed by the Secretary of Agriculture April 21, 1942, and filed herein October 22, 1943.

13. Motion of Polson Logging Company to quash the declaration of taking filed October 22, 1943, which motion was filed November 6, 1943.

14. Order entered November 12, 1943, adjudging the declarations of taking dated January 10, 1942, and April 21, 1942, and filed January 21, 1942, and October 22, 1943, respectively, unauthorized and of no effect, and quashing the judgment entered on the first of said declarations of taking.

15. The declaration of taking, with map attached, executed by the Under-Secretary of Agriculture November 2, 1943, and filed herein November 12, 1943.

16. Certified copy of letter of the Under-Secretary of Agriculture to the Attorney General of the United States dated November 2, 1943, and filed herein November 15, 1943.

17. Motion of Polson Logging Company to quash and adjudge null and void the declaration of taking filed November 12, 1943, which motion was filed November 24, 1943.

18. Second amended petition in condemnation, lodged May 1, 1944, and filed May 23, 1944.

19. Motion of the United States for the entry of judgment [110] on the declaration of taking filed November 12, 1943, which motion was filed May 5, 1943.

20. Order granting petitioner's motion for judgment on the declaration of taking, denying respondent Polson Logging Company's motion to quash, entered May 23, 1944.

21. Polson Logging Company's proposed order granting petitioner's motion for judgment on the declaration of taking filed November 12, 1943, with the Court's refusal thereof and allowance of exceptions, filed May 23, 1944.

22. Exceptions of Polson Logging Company to the order granting petitioner's motion for judgment on the declaration of taking filed November 12, 1943, which exceptions were allowed and filed May 23, 1944.

23. Judgment entered May 23, 1944, on the declaration of taking filed November 12, 1943.

24. Exceptions of Polson Logging Company to judgment on the declaration of taking entered May 23, 1944.

25. All Clerk's journal entries relative to proceedings had and judgments made and entered in the above entitled cause including, but not limited to, the journal entries for the following dates: January 23, 1942; March 30, 1942; April 11, 1942; May 4, 1942; June 8, 1942; June 22, 1942; July 7, 1942; August 3, 1942; August 17, 1942; September 14, 1942; October 19, 1942; February 2, 1943; October 22, 1943; October 25, 1943; October 29, 1943; November 6, 1943; November 12, 1943; May 1, 1944; May 19, 1944; May 23, 1944. [111]

26. Appellant's condensed statement of the evidence and proceedings at hearings had herein October 29, 1943, November 6, 1943, and May 19, 1944, two copies of which, together with two copies of the reporter's transcript of such evidence and proceedings are filed herewith.

27. Petitioner's Exhibit No. 1 and Respondent's Exhibit No. A-1 referred to in said condensed statement of evidence and proceedings and admitted in evidence November 6, 1943.

28. Order granting leave to amend declaration of taking, filed June 7, 1944.

29. Mandate from Circuit Court of Appeals for the Ninth Circuit, filed June 29, 1945.

30. Motion for order amending declaration of taking and subsequent pleadings, filed September 18, 1945.

31. Order amending declaration of taking and subsequent pleadings, filed September 20, 1945.

32. Exceptions of Polson Logging Company to order amending declaration of taking, filed September 20, 1945.

33. Motion of Polson Logging Company to quash and declare void the declaration of taking filed November 12, 1943, and to vacate the judgment thereon entered May 23, 1944, which motion was filed September 20, 1945.

34. Order fixing date of valuation, with exceptions thereto, filed September 24, 1945.

35. Order filed November 12, 1945, denying Polson Logging Company's motion to quash declaration of taking and to vacate judgment entered thereon.

36. Answer of Polson Logging Company to second amended petition in condemnation, filed November 12, 1945. [112]

37. Petitioner's requested instructions.

38. Polson Logging Company's requested instructions.

39. Verdict.

40. Polson Logging Company's motion for new trial.

41. Order denying motion for new trial.

42. Judgment on verdict, with exceptions of Polson Logging Company.

43. Motion of United States to cancel check of $6500.00.

44. Order directing cancellation of check for $6500.000, entered January 18, 1946.

45. All Clerk's journal entries relative to proceedings had and orders and judgments made and entered in the above entitled cause subsequent to May 23, 1944, and including but not limited to the journal entries for the following dates: June 29, 1945; September 8, 1945; September 18, 1945; September 20, 1945; September 24, 1945; November 12, 1945; November 13, 1945; November 14, 1945; November 19, 1945; November 20, 1945; December 3, 1945; December 17, 1945; December 19, 1945; January 18, 1946.

46. Appellant's condensed statement of the evidence and proceedings at the trial on the issue of compensation had herein November 12, 13, 14, 19 and 20, 1945, two copies of which, together with two copies of the reporter's transcript of such evidence and proceedings are filed herewith.

47. All exhibits of both petitioner and respondent admitted in evidence on the trial and referred to in the reporter's transcript of the evidence and appellant's condensed statement of the evidence at such trial. [112]

48. Notice of appeal, filed March 18, 1946.

49. Bond for costs on appeal, filed March 18, 1946.

50. Order extending time for docketing appeal and time for serving and filing appellant's desig-

nation of the record on appeal, entered March 18, 1946.

51. Statement of points on which appellant, Polson Logging Company, intends to rely on appeal.

52. Stipulation re record on appeal, filed April 15th, 1946.

53. This designation of contents of record on appeal.

Dated this 15th day of April, 1946.

L. B. DONLEY,

F. D. METZGER,

METZGER, BLAIR, GARDNER & BOLDT,

Attorneys for Appellant, Polson Logging Company.

The undersigned, attorneys for the United States of America, hereby acknowledge receipt of copy of the foregoing designation of contents of record on appeal and of the statement of points on which the appellant intends to rely on appeal, being Item No. 51 in said designation.

Dated this 15th day of April, 1946.

/s/ F. P. KEENAN.

[Endorsed]: Filed April 15, 1946. [113]

[Title of District Court and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL MATTERS TO BE CONTAINED IN THE RECORD ON APPEAL

The United States of America, Appellee herein, designates the following additional matters to be contained in the record on appeal:

1. The Clerk's certificate as to the deposit of $688.00 filed October 22, 1943.

2. The reporter's transcript of the evidence and proceedings of the trial on the issue of compensation had herein on November 12, 13, 14, 19 and 20, 1945, two copies of which appellant has heretofore filed.

Dated at Seattle, Washington, this 19th day of April, 1946.

/s/ J. EDWARD WILLIAMS,
/s/ F. P. KEENAN,
Attorneys for United States of America, Appellee.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 22, 1946. [114]

[Title of District Court and Cause.]

STIPULATION AS TO EXHIBITS

It Is Hereby Stipulated by and between the United States of America, Petitioner, and Polson Logging Company, Respondent, by and through

their respective undersigned attorneys, that all of the original Exhibits which were offered and received in evidence or offered but not received because of objections thereto were sustained, consisting of Petitioner's Exhibits 1 and 2, which are maps, Petitioner's Exhibits 3 and 6 to 17, inclusive, which are photographs, and Petitioner's Exhibit 18, which is a map, and Respondent's Exhibit A-2, which is a map, Respondent's Exhibits A-3 to A-11, which are photographs, Respondent's Exhibit A-12, which is a map, Respondent's Exhibit A-13, which is a summary or estimated cost of production new, and Respondent's Exhibit A-14, which is a letter from the United States Forest Service to Polson Logging Company, shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and that an order to that effect may be entered by the above entitled Court upon the presentation and filing of this Stipulation and without other notice; and that none of said Exhibits nor any copies or reproduction thereof need be attached to or incorporated in either the Appellant's Condensed Statement of the Testimony or the Reporter's Transcript [115] of the Testimony.

Dated this 14th day of May, 1946.

F. P. KEENAN,
Of Attorneys for Petitioner,
United States of America.

L. B. DONLEY,
F. D. METZGER,
METZGER, BLAIR, GARDNER & BOLDT,
Attorneys for Respondent,
Polson Logging Company.

[Endorsed]: Filed May 22, 1946.

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

Pursuant to the written stipulation of the parties on file herein,

It Is Ordered that the originals of all Exhibits offered and received in evidence or offered and refused, mentioned in said stipulation, to-wit: Petitioner's Exhibits 1 to 3, inclusive, and 6 to 18, inclusive, and Respondent's Exhibits A-2 to A-14, inclusive, shall be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit with the Transcript of Record on Appeal.

Done in Open Court this 22nd day of May, 1946.

/s/ CHARLES H. LEAVY,
Judge.

Presented by:
/s/ F. D. METZGER.

[Endorsed]: Filed May 22, 1946. [116]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing Transcript, consisting of pages numbered 1 to 116, inclusive, together with the original Reporter's Transcript of the Trial had on November 12, 13, 14, 19 and 20, 1945, the original Condensed Statement of Testimony and the record heretofore certified which was printed as the Transcript of the Record in Cause No. 10870 of the records of the Circuit Court of Appeals and which is included in and made a part hereof by this reference pursuant to Stipulation of the parties filed April 15, 1946, is a full, true and correct copy of so much of the record, papers and proceedings in Cause No. 323, United States of America, Petitioner-Appellee vs. Polson Logging Company, a corporation, Respondent-Appellant, as required by Appellant's Designation of the Contents of the Record on Appeal and Appellee's Designation of Additional Matters to be Contained in the Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from that certain judgment of the United States District Court for the Western District of Washington, Southern Division, [117] entitled "Judgment on the Verdict," filed December 19, 1945, and also from that certain judgment of the said District Court entitled "Judgment on the Declaration of Taking," filed May 23, 1944, to the

United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the original Reporter's Transcript of the Proceeds and Trial had on November 12, 13, 14, 19 and 20, 1945, in two volumes, consisting of pages numbered 1 to 547, inclusive, and the original Condensed Statement of Testimony, consisting of pages numbered 1 to 148, inclusive, and original exhibits, numbered as follows: Petitioner's 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18, and Respondent's A-2 to A-14, inclusive, are herewith transmitted to the Circuit Court of Appeals for the Ninth Circuit.

I do further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, and the said fees and charges have been paid in full by the Appellant herein, to-wit:

Appeal fee	$ 5.00
Clerk's fee for preparing Transcript of the Record on Appeal	16.50
	$21.50

In Witness Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 25th day of May, 1946.

[Seal] MILLARD P. THOMAS,
Clerk.
By /s/ E. E. REDMAYNE,
Deputy. [118]

In the District Court of the United States for the Western District of Washington, Southern Division

No. 323

UNITED STATES OF AMERICA,
Petitioner,

vs.

POLSON LOGGING COMPANY, a corporation, et al.,
Respondents.

Be It Remember that on the 12th day of November, 1945, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Western District of Washington, Southern Division, in the city of Tacoma, and state of Washington; the Petitioner appearing by F. P. Keenan, Special Assistant to the Attorney General, and Anthony L. Stella, Special Attorney, Department of Justice, and the Respondents being represented by F. D. Metzger and A. E. Blair, of Metzger, Blair & Gardner; both sides being ready for trial, a jury was duly empanelled; and

Whereupon, the following proceedings were had and done, to-wit:

Mr. Stella: We have a formal Order here in which the Court denied the respondent's motion to dismiss, and strike, and the demurrer to our peti-

tion, which I believe at this time should be entered. Mr. Metzger has been served with a copy of it.

Mr. Metzger: The Order was served some time ago, and at my request presentation was delayed until this morning, your Honor. I have no objection to the form of the Order. I would like the exceptions to be a little more specific—the exceptions as entered in the Order, it says it excepts to the foregoing Order. I would like to take exception to have them noted to each and every subdivision of the Order.

The Court: The record will show that you have made such a request and it will be allowed.

Mr. Stella: And, if the Court please, at this time I would like to move to strike the answer of the respondent, Polson Logging Company, which they have this day filed and served on the Government. No pleading is necessary in a condemnation case, and also for the reason the answer has not been timely served.

The Court: It is not necessary to file an answer in a proceeding of this kind, and if an answer is to be considered, there might be some issue as to [1*] whether it has been timely filed, but I do not think that I shall pass upon that motion at this time. I see no necessity for passing on it now. I would want to consider it a little farther before I granted your motion to strike it, but I do not want the respondents to be misled, without having—the Court having an opportunity to pass upon this as to the

* Page numbering appearing at foot of page of original Reporter's Transcript.

legality if they are going to offer affirmative evidence that supports these various allegations that are set forth herein, because that would become a question entirely whether it is competent evidence or not.

Mr. Metzger: I think the answer, so far as affirmative matter, is only questions of law. The answer is filed, your Honor, because of the Circuit Court of Appeals said the respondents may raise these questions by its answer, and because the Circuit Court of Appeals might construe that we were waiving those points of law without raising them in an answer. By their decision, we simply are trying to preserve the record on legal points by setting them up in the answer. That is all. There is no factual affirmative matter.

The Court: I think in view of that statement I will deny your motion to strike the answer. The answer is not going to the Jury anyway, and allow you an exception. [2]

Mr. Stella: We will take an exception to that, your Honor.

The Court: Now, it is time for the morning intermission, before we actually commence the taking of testimony, and our recesses will usually be about fifteen minutes, and there will be one in the middle of the morning and one in the middle of the afternoon and our noon intermission will be an hour and a half to two hours depending on the progress we are making on the trial of the case.

I am going to give you certain admonitions that

I shall expect you to follow very carefully, because by following them no difficulties can arise at all. By failing to follow them, there may be situations that arise unduly and improperly reflect upon the whole jury. No juror must discuss with his fellow juror any matter in connection with this case until it is finally submitted to you, because, you have taken an oath when you qualified here that you are going to try this case on the law as the Court gives it to you, and the evidence as you hear it, so if you have entered into a discussion with a fellow juror at any one of these intermissions, or any other time, you and he might gather certain facts or come to certain conclusions and inferences that the other ten did not, and you see, [3] that is the reason for that rule.

The rule further provides that you must not discuss with anybody, the witnesses or parties, or any other—anything in connection with this case, and await your final decision until after the case has been tried fully, and arguments have been made, and the Court has instructed you. Then you are at liberty to discuss it at any length you wish. To wilfully violate the admonition that I have just given you, if course, subjects you to punishment by the Court, because it would be a contempt of Court.

If any one comes to you and tries to talk to you about the case, it is your duty to tell them that you are a juror in the case and not at liberty to discuss it. If they insist upon it, it is your duty to report the matter to the Court, and then they will be dealt

with according to law. Now, in many court rooms we have a special room for the jurors so they will not be placed in the embarrassing position of some one even incidentally coming up and trying to say something to you. We do not have that situation here, so each of you will have to look after yourselves and see that you do not unconsciously or consciously violate this mandate, and that your minds are kept free and open. [4]

There may be some further instructions along this line that the Court will feel inclined to give to you.

I am going to suggest this to you, too; I cannot allow you to take notes, so you will have to give very close attention, and of course, the case will be argued on either side, and the Court will instruct you on the law on it, and I further am going to advise you that it is an unwise thing for jurors when sitting in the jury box when Court is in session, to carry on any conversation, however innocent it may be as between themselves, and the fellow at their right or to their left, or in front of them or behind them, because a whispered conversation carried on while court is in session rather distracts from the Court proceedings, and it might develop a suspicion in the minds of some of the parties, either representing one side or the other, and it might lead to a comment to a juror by a fellow juror that "I don't believe that witness" or "I am not inclined to believe that witness." For that reason I am going to suggest that you refrain from conversation and I am going to advise you that

you have the burden of listening closely to what takes place so you can charge your memory with what the evidence was when it comes time to discuss it, and with this somewhat extended [5] admonition I am going to excuse for a fifteen minute recess.

(Recess.)

The Court: Now, you may proceed, Mr. Keenan.

Mr. Keenan: If the Court please, the Government takes the position in this case that the burden of proof, and the burden of going forward, is on the respondent, and our authority being United States ex rel T.V.A. versus Powelson, 319 U. S.; 266; Westchester County Park Commission versus the United States, 143 Federal 2nd; 688, the United States versus Harrel; 133 Federal 2nd; 504.

The Court: Will you give me that first citation? You are citing one in the District of Columbia, I take it?

Mr. Keenan: The first one is, 319 United States; 266, and 87 Law Edition; 1390.

The Court: Now, what is the one in the Eighth Circuit?

Mr. Keenan: The one in the Eighth Circuit is 133 Federal 2nd; 504.

The Court: Yes, and I think I shall have to ask for the Second Circuit case. [6]

Mr. Keenan: 143 Federal 2nd; 688, 1944. I might say, your Honor, I know of no other cases discussing this or mentioning it—the Federal condemnation cases.

The Court: Unless these cases—and I shall examine them in the next intermission, would clearly hold that the general rule of state practice prevails in condemnation cases and issues such as you raise here, I shall take the position that the burden—that it is necessary that the Government present its case in the first instance as to the value. The respondent to present their case, and if any new issues are raised, or any matters that properly fall under rebuttal on this matter of fixing value the Government shall have an opportunity to offer such evidence in rebuttal, and I take your statement to be in the nature of a motion that the Court now rule upon the issue you raise, and I shall have to rule against you and allow you an exception and direct that you proceed.

Mr. Keenan: May it appear also on the record that by proceeding we are not in any way waiving the motion.

The Court: If there is merit in it you may raise it in the Appellate Court.

Now, you desire to make a statement. I am [7] going to suggest to counsel on both sides that if there are plats and maps and things of that nature, that during the intermission, so far as possible, they should be posted on the board and we can save the time and inconvenience.

Mr. Keenan: The Court may recall in this case that we had some controversy as to the proper date of valuation, and I believe an Order has been entered here that the proper date is October 22, 1943.

The Court: That is the day when the fee simple title was taken.

Mr. Keenan: And I assume that the Government in going forward to its testimony, is using this date and may it be understood we have a continuing objection and exception.

The Court: Yes. You mean, you have an objection to going forward, not to the date?

Mr. Keenan: No, I mean throughout the objection will run throughout the trial when we use that date. We are going to use that date. I asume that is the only thing we can do as a practical matter.

The Court: And it is your position that the value is at an earlier date rather than the value as of that date?

Mr. Keenan: Not necessarily. I do not know frankly.

The Court: Very well, it would depend on what tack the case would take.

Mr. Keenan: May I proceed?

The Court: Yes.

Mr. Keenan: May it please the Court, and Gentlemen of the Jury:

This is a——

The Court: I am just wondering if that could not be moved out somewhere. I think some of the jurors will have a great deal of difficulty to see that where it is. Better move it out over here. (Re-

ferring to easel). Counsel can sit on the other side of the counsel table.

Now, the jurors can see that better.

Mr. Keenan: This is a regular Government map, put out by the Forest Service, and this area in here (indicating) is a portion of the Olympic National Forest. These lines in red represent the property taken in this case—that is which the United States has taken, and this was originally a railroad logging grade in which the steel had been removed. It had been used, or a portion of it at least, for truck logging thereafter, and there are, in addition to it, there is an addition to this [9] right-of-way which is a hundred feet wide, two small parcels of land were taken here that together contained—I believe it is a hundred acres. We will have a large map of course, and I assume that the other side, the respondents—the landowners, will have a larger map also, showing this area blown up.

Aberdeen is down here (indicating) and I am not sure what the distance is. I think it is something like 25 or 30 miles. It will be your function to determine the value of the land taken.

We will present evidence to the length of this roadway taken, the condition it was in when taken, the condition of the bridges on that railroad, and there were seven; the nature of the ground around this—adjacent to this road. I might say now, it is practically cut-over land about that road. Of course, we will introduce our evidence as to value.

It will be the Government's contention that when this road was taken and set up as a highway, it in fact benefitted those cut-over lands through which it ran, and the Polson Logging Company was benefitted rather than hurt by this taking.

I think this just covers the situation. I am not allowed to do any more than outline the [10] Government's testimony at this point.

Shall we proceed now, with the taking of testimony, your Honor?

The Court: Yes. You had better Mr. Keenan, advise the clerk the order in which you want these exhibits marked. You should advise the Court as to the order in which you want these exhibits marked.

Mr. Keenan: I would like to have the one on the board now, marked Petitioner's Exhibit 1 for identification.

The Court: Is there any objection to the introduction of it Mr. Metzger?

Mr. Metzger: Not exhibit 1, no.

(Whereupon, map referred to was then received in evidence and marked Petitioner's Exhibit #1.) [11]

J. M. RANDS,

produced as a witness on behalf of the Petitioner, after first being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Mr. Rands, your full name?

A. J. M. Rands.

Q. Where do you reside, Mr. Rands?

A. Portland, Oregon.

Q. And what is your occupation?

A. I am a construction engineer, in the Forest Service.

Q. And the regional office of the Forest Service is in Portland, is it not? A. That is right.

Q. Are you attached to the regional office?

A. Yes, sir.

Q. Will you tell us briefly what experience you have had as an engineer? Start in at the time you were in college. Did you study engineering in college?

A. Two years, 1911 to 1913, Washington State.

Q. And will you tell us just briefly about your life from 1913 to date, insofar as it has any bearing on your work as an engineer?

A. Well, in 1916—'15, '16, I was with Bannick Engineering [12] Company, Pocatello, Idaho.

Q. Speak up so that the jurors can hear you, Mr. Rands, please.

A. And Union Pacific Railroad.

'17 to '19, I was with the 23rd Engineers, A. E. F.

(Testimony of J. M. Rands.)

'20, I was with the Southern Pacific Railroad as an official engineer.

'21 to '25, I was with the Portland General Electric Company as a resident engineer, and assistant superintendent of construction of hydraulic electric development.

'26, I was with the Puget Sound Power and Light Company.

'27, I was with the Elwood Trimble, Terminal Company on Dock Street, in Portland

'28 to—'29 with the Public Works Engineering Corporation—Field Engineer, Municipal Water Developments.

'30 and '31, with the Department of Commerce, and Army Engineers as a field engineer inspector.

'32 to date, I have been a construction engineer for the Forest Service.

Q. Now, are you familiar, Mr. Rands, with the property that was taken in this case by the United States? [13] A. Yes, sir.

Q. And I refer you to the map which is now on the easel, and marked Petitioner's Exhibit No. 1 for identification. Will you tell us just exactly what that map is—what it represents?

A. Well, that is a standard Forest Service map, which shows the Olympic National Forest lands, and the Olympic National Park and adjoining lands in the Olympic Peninsula.

Q. Now, is that map, exclusive of the lines put in, in red in the lower left hand portion, does that

(Testimony of J. M. Rands.)

map represent a standard government publication?

A. That is right

Q. That is regularly furnished to members of the public, is it? A. Yes, sir.

Q. By the Forest Service? A. Uh-huh.

Q. Will you explain to the—what those lines in red are, in the lower left-hand corner?

A. That represents the lines that are the roadway—abandoned logging grade and land that has been taken in this declaration of taking.

The Court: You have got to speak a little louder, because I am having difficulty in hearing you, [14] and I think the jury will, too.

A. That represents the lands that have been taken in this declaration of taking.

The Court: I think you had better get down there and point it out. Go ahead and point out the place.

A. This is the roadway here (indicating), you see, and then there are a couple of tracts beyond, besides the abandoned logging grade. That is, they are all in this declaration of taking.

Q. Did you put those lines on that map?

A. They were put on under my supervision.

Q. Do they—those lines that were added in red, do they correctly depict the property taken in this case? A. Yes.

Mr. Keenan: At this time the Government offers in evidence Petitioner's Exhibit No. 1.

The Court: It has been admitted. It has been admitted on stipulation.

(Testimony of J. M. Rands.)

Mr. Keenan: Sorry, I did not understand.

The Court: You may take the stand.

Mr. Keenan: You will pass your Exhibit to the bailiff and the bailiff will pass that to the witness, and we will follow that rule throughout the case.

Mr. Keenan: I beg your pardon, Your Honor.

Q. The Bailiff has just handed you Petitioner's Exhibit No. 2 for identification. Will you tell us what that is, Mr. Rands?

A. Well, yes, this is a map showing the various lines, the abandoned logging grades that were in this declaration of taking.

The Court: Speak a little louder.

A. Also, too, additional tracts, tracts 2 and 3, on the map, is shown in green. It shows the land that was taken.

The Court: Did you desire, Mr. Keenan, to refer further to this map? Do you a little later on?

Mr. Keenan: Yes, we are going to be referring throughout the case.

The Court: Maybe you had better put it on the easel.

Mr. Keenan: I understand there was going to be some dispute as to its admissibility, possibly, is that right?

Mr. Metzger: I don't know as there is any dispute as to its admissibility. There seems to be some inaccuracies about it.

Q. Did you prepare this map, Mr. Rands?

A. No.

Q. Was it prepared under your direction? [16]

(Testimony of J. M. Rands.)

A. It was prepared under my direction.

Q. And you have checked it, have you?

A. Yes.

Q. And does it, in your opinion, correctly show the lands taken in this case? A. Yes.

Q. And it shows the location of the bridges that were taken with that land? A. Yes.

Mr. Keenan: At this time, the Petitioner offers in evidence, Petitioner's Exhibit No. 2, for identification.

The Court: Any objections, Mr. Metzger, or Mr. Blair?

Mr. Metzger: No objection.

The Court: I think the Bailiff had better put it on the easel.

Your record may show it was admitted, now, you may proceed.

(Whereupon, map referred to was received in evidence and marked Petitioner's Exhibit number 2.)

Q. Mr. Rands, will you step down to the board, and point out to the jury the location of the public highway there?

A. This is the public highway here (indicating).

Q. And that is designated United States Highway 101, is it? A. That is right.

Q. Now, will you start in at the highway and trace the portion of the road that was actually taken by the Government in this case?

A. This was——

The Court: Now, step down, if you will, just

(Testimony of J. M. Rands.)

step a little to one side. This is all for the benefit of these twelve people here (indicating the jurors).

A. Well, this line here——

The Court: You will have to speak loud enough so they can all hear you.

A. (Continuing): All of these lines shown in green are the roadways, and these two tracts are the two tracts that were taken under this declaration.

Q. When you say under this declaration, you mean the tracts taken in this case?

A. That is right.

Q. And the property taken in this case was this road and these tracts designated two and three?

A. That is right.

Q. Now, there is another tract on that map, isn't there, designated tract 1?

A. It is this tract here (indicating), which was taken. [18]

Q. Well, that is a portion of the road, is it?

A. That is portion of the roadway.

Q. And are all of the bridges that are on that road indicated on that map? A. Yes.

Q. And would you point out the boundary line of the Olympic National Forest?

A. This is the boundary line shown in the hatching, along this upper side of the map.

Q. Now, this map has on it "Township 21 North, Range 9, West of Willamette Meridian." As a matter of fact, some of the property involved also is in "Township 21 North, Range 10 West, isn't it?

(Testimony of J. M. Rands.)

A. That is right.

Q. Part of the property, or part of the land shown on that map is in "Township 21 North, Range 10 West, is it not? A. That is right.

Q. Will you point out the line of—between the Range 9 West and Range 10 West?

A. This is your range 9 here (indicating). This portion being 10, and this portion (indicating), being in 9.

Q. Well, for convenience's sake I suggest that you take your pen and write in the designation 10 West there.

(Witness does as directed.)

The Court: Let me interrupt you a minute. [19]

Mr. Keenan: Is this map on the usual natural standard, the top is north?

A. That is right.

Mr. Keenan: That is right.

I think you can resume the stand, Mr. Rands.

Q. Can you tell us how much acreage there is in Tract number 2—how many acres there are in that tract? A 10 acres.

Q. And Tract 3, what is the acreage there?

A. 90 acres.

Q. Now will you tell us how long this road is—how many miles of road was taken all told, here?

A. The total is 14.43 miles.

Q. And now, on October 22nd, 1943, was there a portion of this road that went over land then not owned by the Polson Logging Company?

A. Yes.

(Testimony of J. M. Rands.)

Q. And which portion of the road was it?

A. That is section 16—should I show you?

Q. If you please.

A It would be this one, across this section here (indicating).

Q. Section 16, in Township 20 North, Range 9 West? A. That is right.

Q. And does your figure of 14.43 miles as the road length, [20] include the portion of the road that was in section 16?

A. No, that is excluded.

Q. In other words, the 14.43 miles represents the length of road over the Polson Logging Company's land, is that right? A. That is right.

Q. Now, have you computed the acreage which is included in this 14.43 miles of road?

A. Yes.

Q. And what is that acreage?

A. 173.96 acres.

Q. So, all told, there is 173.96 acres in the road, and there is an extra 100 acres in tract 2 and 3, together? A. That is right.

Q. Now, is the acreage that is in tract 1, which is the highest place in the road, is that included in your 173.96 acres? A. That is right.

Mr. Keenan: You may cross-examine

Mr Metzger: Petitioner's Exhibit No. 2 for identification has been admitted, has it not?

The Court: Yes, one and two. [21]

(Testimony of J. M. Rands.)

Cross-Examination

By Mr. Metzger:

Q. Mr. Rands, is that correct, R-a-n-d-s?

A. That is right.

Q. Can you or will you, for the benefit of the jury, indicate on Exhibit 1 the area which is covered by Exhibit 2?

The Court: Mr. Bailiff, you will have to loosen at the——

Mr. Metzger: I think it shows here, if he has a crayon, I would like to have him outline it if possible.

The Court: Here is a pencil.

(Witness does as directed.)

A. That probably isn't too good, but that is the way it is.

Q. Well, you have indicated in a red outline on Exhibit 1, in general the area covered by Exhibit 2?

A. Yes.

Q. That is right. In other words, it embraces part of the Olympic National Forest, Exhibit 2, does, and a portion of Township 21 North, Range 9 West, and Township 21 North, Range 10 West, lying immediately south of the Olympic National Forest? A. That is right, yes.

Q. Now, on Exhibit 1—or Exhibit 2, rather, you have said that the hatched line towards the top of the Exhibit marks [22] the south boundary of the Olympic Forest. That corresponds with the termination of the green coloring of Exhibit 1?

A. Uh-huh.

(Testimony of J. M. Rands.)

Q. A part of this green that you show as roads taken, is north of the boundary of the forest That is, however, on the land of the Polson Logging Company, is it not? A. That is right.

Q. In other words, there are privately owned lands within the Olympic National Forest?

A. Oh, yes.

Q. And this, that little piece happens to be land privately owned by Polson Logging Company in the forest? A. That is correct.

Q. Is that right? A. That is right.

Q. Now, you mentioned State Highway 101, and pointed it out as being about a mile east of the Range 9—a mile west, I beg your pardon?

A. That is right.

Q. Is that highway, if we had Exhibit 1 uncovered entirely, extends all the way from Hoquiam clear up around the Olympic Peninsula as the Loop Highway, is it not?

A. I wouldn't be sure about the number, but I know the highway goes around. [23]

Q. But, that is what is known generally as the Loop Highway that runs from Aberdeen and Hoquiam, clear around to Forks, and Port Angeles, Port Townsend? A. Yes.

Q. And that highway runs through, as shown in Exhibit 1—it runs—continues north, and runs right through the Olympic Forest in this area that I'm now indicating? A. Yes.

Q. Probably shown there?

A. Yes, it is shown there.

(Testimony of J. M. Rands.)

Q. You say that section 16, is owned by the State. Do you know that Polson Logging Company has rights in Section 16?

A. I believe I saw a right-of-way from the State to them at one time. I don't know how old or how recent it is.

Q. Well, you don't want to tell the jury—you don't want the jury to believe your statement that Polson Logging Company has no rights in section 16, then, is that right? A. No.

Q. Beg pardon? A. No.

Q. Now, what is the length of the road across section 16?

A. I believe it is about a mile and a tenth—about 1.1 miles. [24]

Q. Now, how did you determine the length of this 14 miles of road that you say is there?

A. That was a transit and chain survey.

Q. Did you make it?

A. No, under my supervision.

Q. It was made under your supervision?

A That is right.

Q. Were you on the ground yourself?

A. I didn't take any part of the survey. I have been over the property, however.

Q. Actually, Mr. Rands, as indicated on this Exhibit, there was, on the date referred to October 22nd, '43, an extension of this road across the tracts 2 and 3, connecting with the—which you indicate as line "J" and the east, is that true?

A. That is right.

(Testimony of J. M. Rands.)

Q. How long is that?

A. I can't answer that.

Q. You can't answer that? A. No.

Q. The road is the same as the rest of the road, is it not, across those tracts?

A. In what respect?

Q. Well, I mean is there any difference in the character of the road that you indicate here as—marked here as [25] line "K" and the road which crosses tract 3 and 2, and joins up with line "J"?

A. No, they are generally the same sort of a road.

Mr. Metzger: That is all.

(Witness excused.)

The Court: It is time now for the noon intermission, so we will take—and I think unless, there is some reason shown to the contrary, I shall reconvene at 1:30 and adjourn at 3:30 this afternoon, just make up the half hour at the noon hour. That will give us all an opportunity, unless you feel Mr. Keenan, by reason of your cold—you seem to be suffering from one, you are not in condition to proceed.

Mr. Keenan: No, I can make it. I am afraid I am an awful annoyance to the other people. I am not sure whether I am a source of danger or not.

The Court: Well, there is some, but it is probably remote, and so remember the admonition I gave to you at the opening—of the first intermission, and

you are now excused until 1:30, and the Court will be at recess until 1:30

(Recess.) [26]

1:30 o'clock p.m.

The Court: Now, you may proceed.

LESTER M. EDGE,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Edge?

A. Lester M. Edge.

Q. And where do you reside?

A. Olympia, Washington.

Q. And how old are you? A. Forty-three.

Q. And what do you do for a living?

A. I am a logging engineer for the Olympic National Forest.

Q. Now, what are the duties of a logging engineer—that is, a logging engineer in the forest service?

A. Well, in my particular case I plan transportation systems for logging, for forest protection, and for administration.

I also have technical supervision of road and [27] bridge construction, and maintenance.

I also make all of the estimates for the construction costs on logging roads.

(Testimony of Lester M. Edge.)

Q. Now, when did you first start to engage in any business connected with logging or road building?

A. Well, I have been connected with it most all the working years of my life I started out in 1917. From then on, until 1924, about the time I finished High School, I worked in the woods and went to school.

Q. Did you go to college anywhere?

A. Yes, I attended the University of Montana from 1924 to 1927, and majored in Forestry.

Q. And what have you done since 1927,—tell us briefly.

A. 1927 and 1928 I worked as a draftsman for the Northern Pacific Railroad on main line railroad construction. About 1928 to 1930 I worked as a construction superintendent for the Pickering Lumber Company, and from 1930 to 1931 I was topographer for the Oregon Electric Railroad on a railroad location.

Q. What does a topographer do?

A. A topographer does field mapping along preliminary lines, and location, so that the permanent location can be accurately located in reference to the terrain. That is, take advantage of site, cuts, and fills, and flats, and what have you, and put in the best grade that is [28] possible.

Q. All right, I think we have got you up to about 1931, is that correct? A. That is right.

Q. And then, what did you do?

A. From 1931 to 1932 I was a level man for the

(Testimony of Lester M. Edge.)

Bureau of Public Roads on road construction in Northern Iowa, and from 1932 and 1933 I drove cat for the Willamette National Forest.

Q. Caterpillar?

A. Yes, sir, tractor operator.

Q. And then what?

A. And 1933 to 1942 I was a project superintendent, and I was in charge of location, construction, and maintenance of roads and bridges, telephone lines, trails, water systems. I had charge of heavy equipment operations that did those jobs.

Q. Whereabouts?

A. Most of it was on the Willamette National Forest.

Q. Down in Oregon? A. Yes, sir.

Q. You worked directly for the Forest Service then, or was that a C.C.C. connection?

A. Well, I worked—I was connected with the three C's, yes, but I was in the Forest Service. I was considered [29] a Forest Service employee.

Q. And did you leave that job to come up here to the Olympic—— A. Yes, sir.

Q. And how long have you been the logging engineer of the Olympic National Forest?

A. 1942 to the present.

Q. Are you familiar with the lands that have been condemned in this case?

A. Yes, sir, I am.

Q. And when did you first see those lands?

A. In October, 1942.

(Testimony of Lester M. Edge.)

Q. What was your occasion for visiting the lands?

A. I examined the roads with the idea in mind to transport timber from the Olympic National Forest on the north, to the main Olympic Highway.

Q. How many times in all have you been over this road?

A. Well, it has been pretty continuous since July, 1943, that is.

Q. When were you last there?

A. Pardon?

Q. When were you last on the road?

A. Last Sunday, about 5:00 o'clock.

Q. You mean, yesterday?

A. Yes, sir. [30]

Q. Can you tell us what condition this road was in generally when you first examined it, in October of 1942? A. Yes.

Q. Will you please——

Mr. Metzger: I object as immaterial and irrelevant, Your Honor, please. The date is October, 1943.

The Court: Objection will be overruled and he may answer, and exception allowed.

A. Lines "A" and "B," that is the green line——

Q. Do you want to step down to the board and take the pointer? A. I would like to, yes.

This line is line "A" and "B."

Q. I think, if you stood over here perhaps it would be better.

(Testimony of Lester M. Edge.)

A. This is line "A" and "B." Line "A" runs to about that point there (indicating on map), and line "B" is this section here (indicating on map), and then there is line "C." Line "D." Line "K," going into track "C," and coming out of track No. 2, which is line "J," and then there is a line "F," and the line "L," over here in section 1. This section in here, line "A" to that point, and then on to the end of line "B," I found was an abandoned railroad grade. At the time, it was being used as a logging road. The operator or operators—I [31] was acquainted with one. The other one I am not certain. The one I know that was logging in there was a man by the name of McKay, and I believe the other operator was M. D. Timber Company. Besides, the road was very heavily grown up with brush. Ditches—the drainage ditches along the side were full of debris, the culverts had originally been made of logs, had pretty much rotted out and had collapsed. Drainage in some places was running across the roads. Other places, the water level was very close to the surface and there was chuck holes in it.

The bridges—the first one here, was Stevens Creek Bridge. That was a log stringer. I believe it was about 150 feet long. I am not certain of the exact length, but that is very nearly the length of it. It had logged crib piers—big heavy log crib piers, and log stringers. In my estimation, the bridge was unsafe for logging traffic, and since that bridge has been replaced, and I had a chance to ex-

(Testimony of Lester M. Edge.)

amine those stringers and the abutments, and they were rotted. They were absolutely unsafe for logging traffic, although logging trucks were running over the bridge at the time.

The next bridge or trestle, rather, was known as the O'Brien Creek Bridge, or trestle. That [32] is a small creek in a rather deep wash. That particular trestle was about 80 feet above the water surface—the trestle itself. That is, the piling on the trestle were of Western Red Cedar, along with the caps, and it was in a pretty good state of preservation. However, there was two log crib approaches to that, and this approach on the north side had started to slip. It had slipped to an extent that the stringer had—or the stringers rather, on that approach, had dropped about a foot below the grade of the deck, itself. The bridge deck had been shimmed up—that structure there, in my estimation, was also unsafe for log truck hauling, for the reason that that north approach there, had started to slip. However, logs were being hauled over it.

The next bridge was across the west fork of the Humptulips. That is a pile bent structure of Western Red Cedar—that is, the bents, the piling and the caps are Western Cedar. The piling was in a fair state of preservation. In fact, they were all good with the exception of about thirteen, and some of those had either been knocked out by high water, or had rotted out, and it was necessary to replace them. At the time that I examined that bridge, I found two stringers that were definitely unsafe.

(Testimony of Lester M. Edge.)

However, I did [33] not have a very good chance to get at the rest of them. They were not very accessible, and could not examine very closely. However, that bridge has also been repaired to a certain extent—that is, those stringers that decayed have been replaced, and instead of two stringers being unsafe, there were five. The deck joists on that bridge were replaced, and the decking, and those piling—those thirteen piling have either been replaced, or they have been repaired.

The next bridge was across the dry ravine in section 16. That was just a ravine, and not very much water outside of a little drainage concerned. I think that trestle is about 138 feet long. That structure was in very good shape, with the exception of the deck joists, and the deck. They have since replaced.

Donkey Creek No. 1 crosses Donkey Creek. It is about 275 feet long, and that bridge was probably in the best shape of all of them. That is, it was in good condition, with the exception of the deck which we have repaired in a few places, and that is suitable for log hauling now.

Donkey Creek Bridge No. 2 is about—I believe it was about 75 feet long, and that bridge, with the exception of the deck, is okeh, and that has been [34] redecked, and that is the same with Donkey Creek No. 3.

Donkey Creek No. 3 is about 80 feet long, I believe. Line "C" and line "D" was an old abandoned railroad grade, and had not been used. That was pretty badly grown up with brush, and that I

(Testimony of Lester M. Edge.)

believe was opened by an operator by the name of Johnson that logged national forest timber, and it has been resurfaced and just barely usable as a logging road. That is, there isn't any turnout, and the ditches and culverts are in bad shape.

Line "F" is a part of a road system that comes down in here (indicating), and connects with this system here. There is a lookout here (indicating on map). That is known as Burnt Hill Lookout, and that road is used to administrate that lookout and to make a connection across the top here, to avoid going clear down here and coming up from here. The Forest Service has maintained that road for a number of years. It was constructed by the Forest Service. I don't know the exact date, but I think it was along in '35 or '36. This portion of this road in here (indicating) is not suitable for a logging road. This is, however (indicating).

Q. How wide is this road?

A. Well, at the present it has about a 16 foot crown. [35]

Q. What do you mean by a 16 foot crown?

A. Well, that is from the ditch to ditch.

Q. Well, is it wide enough for two cars—two trucks? A. No, it is not.

Q. When you first saw the road, was the steel still there?

A. No, the steel had been lifted, and it was in use then as a logging road.

Q. How about ties?

A. The ties had been—they had been removed.

(Testimony of Lester M. Edge.)

Q. What is the normal life of a wooden bridge such as those, assuming that the bridge was new?

A. Well, I think about—between fifteen and twenty years. That is, there is the piling and the caps in those bridges constructed for the most part with very good quality of Western Cedar, and that type of wood will last about—from fifteen to twenty years. It varies in localities.

Q. Was there any treated material in these bridges? A. No, no treated material.

Q. In any of the bridges?

A. Not in any of the bridges.

Q. What do you mean by "treated material"?

A. Well, treated material in my estimation is that piling and caps, and other material that has been treated with creosote. [36]

Q. Did you make any estimate for the Forest Service as to the cost of contemplated improvements to this road? A. Yes.

Mr. Blair: If the Court please, we object to the cost of contemplated improvements, unless—I don't see it has any bearing, what improvements the Forest Service may have had in mind.

Mr. Keenan: If the Court please, if benefits are to be shown here, and I think they are admissible in this case, I think we are entitled to show the amount of money of the improvements to be made by the United States Government to the road.

The Court: Objection will be overruled and exception allowed.

(Testimony of Lester M. Edge.)

Q. Now, first, I think your answer was in the affirmative, was it not? A. Yes.

Q. First, will you tell us, Mr. Edge, what was planned by the Forest Service to be done there with respect to this road?

Mr. Blair: We object again, Your Honr, to what the Forest Service may plan, as being wholly immaterial to this case, and certainly in this kind of a case where this property is not being taken for a public highway, there is no question of benefit to this land [37] involved.

The Court: I am assuming it was taken——

Mr. Keenan: The declaration of taking so states.

Mr. Blair: Ever since the road was taken, it has been blocked off, and blocked——

Mr. Keenan: Polson has been there with a guard.

The Court: I can only go on what the petition recites, and my recollection—I can't turn to it immediately, and if I am wrong in that I would be glad to have you——

Mr. Metzger: I think, Your Honor is incorrect in that there is no declaration of this being taken for a public road anywhere.

The Court: We had better settle that question, though I think—you have, Mr. Keenan, the reference to the petition?

Mr. Keenan: Paragraph 2 of the Amended Petition in condemnation provides that the Secretary—and similar language appears in the declaration of taking,—Secretary of Agriculture of the United States of America has determined that in his opin-

(Testimony of Lester M. Edge.)

ion it is necessary and advantageous to acquire for the United States by condemnation, under judicial process, certain lands hereinafter [38] described for the purposes described in said Acts, to-wit: Provide for the construction, maintenance and use of a highway, logging railroad, logging road, skidway and landing ground purposes, and for ingress and egress, to Olympic National Forest, over which to remove the dead, mature, and large growth of trees and timber products and other products upon and from said forest, and transportation of said timber and timber products and other products and persons and material in the administration, conservation, preservation, and protection of said forest, and prevention and extinguishment of fires therein, or adjacent thereto, and for use as a permanent highway for all said purposes, and for the use of the people of the United States generally for all lawful and proper purposes, having regard to the geographical, topographical and other conditions of said forest.

The Court: Let's proceed, the objection will be overruled, exception allowed.

Mr. Metzger: Your Honor please, before Your Honor passes on that, the taking here is exclusively for a highway, if you call it that, to the forest. It had nothing to do with the intervening lands over which it passes. There is no section—nothing in here that this is a highway for the use of [39] anybody, unless he is going to, or into the forest, or unless he is going to remove the timber from the forest. It has nothing to do, and it is not taken. It

(Testimony of Lester M. Edge.)

is used in general language. It says, "For a permanent highway for all said purposes," and said purposes are all exclusively related to something in the forest, and nothing for anything outside of the forest.

I submit, Your Honor, if you will examine the declaration of taking, in which this proceeding is based, and the second amended petition, I think it is substantially in the same form.

You will find that in the third declaration of taking—you will find this language, if I can find it now. First, before I get to that, the letter of the Under Secretary of Agriculture, addressed to the Attorney General requesting the institution of this proceeding, and showing the purposes for which it was being brought, is this:

"The lands sought to be acquired is for the purpose of construction thereon a highway, logging railroad, skidway and landing grounds, for the purpose of removing or having removed thereover, the dead, mature and large growth of trees, especially Sitka Spruce, being used in connection with the manufacture of airplanes by the Government and our allies, within the Olympic [40] National Forest, and transporting said timber from said Forest to practical points for the manufacture and marketing thereof, and for other purposes."

The instructions in the authority to the Attorney General to institute this action was to acquire a highway, to remove—and only for the purpose of

(Testimony of Lester M. Edge.)

removing timber from the Olympic National Forest, and for no other purpose.

Now, the declaration of taking says—this is the one which is now being relied upon, dated November 21st, 1943:

"The public uses for which said lands are taken are, and said lands are necessary adequately to provide for, the construction, maintenance, and use of, a highway, logging railroad, logging road, skidway, and landing ground purposes, and for ingress and egress, to Olympic National Forest, over which to remove the dead, mature, and large growth of trees, timber products, and other products upon, and from, said forest, and transportation of said timber, timber products, and other products, and persons and material, in the administration, conservation, preservation, and protection of said forest, and prevention and extinguishment of fires therein, or adjacent thereto, and for use as a permanent highway for all said purposes,"—for no other purposes—"said [41] purposes, for the use of the people of the United States, generally, for all lawful and proper purposes." Now, listen, Your Honor—"having regard to the geographical, topographical and other conditions of said forest, and lands in the vicinity thereof, which affect the welfare, safety, and preservation of the forest."

There isn't anything about the use for the public, outside of the forest, anywhere, and what they are relying on——

The Court: Well, the language I have here reads,

(Testimony of Lester M. Edge.)

as you gave it, and it says, "including the use of the people of the United States visiting said forest for business, health, recreation and enjoyment, as are, or may be authorized by Congress, or by executive order, or by the Department of Agriculture, not inconsistent with the admisistration of the forest."

Mr. Metzger: That is right, I beg your pardon, I did not go quite that far, but my point is still there, "including the use of the people of the United States, visiting said forest."

The Court: You mean, they do deny it to the lands that are contiguous to the highway?

Mr. Metzger: Yes, sir, and they haven't any authority to make a public dedication of this road to [42] the people. They are taking it for the United States for the forest purposes only, and they have no authority to dedicate it to the people. The Department of Agriculture hasn't the authority to dedicate it.

The Court: On the issue of authority, the Court is not advised. It is a matter that really should have been brought up before we went into the trial of the case, I feel.

I think I shall let this witness testify and then I will ask the Government to furnish some further authority before we close this case, because I will state now if it be a fact that the Forest Service can deny to the adjacent lands on either side the use of this highway, then the element of offsetting benefits as against them, should not be in this case.

(Testimony of Lester M. Edge.)

Mr. Keenan: I take it Your Honor does not want to hear from me now on that subject?

The Court: No, I regret, however, this issue was not raised so that I could have disposed of it, because it is a matter of no concern to the jury. It is a matter for the Court. However, I shall let this witness testify, and then shall strike from the record if I am satisfied—I think I can more expeditiously do that.

Mr. Metzger: Allow us an exception to Your [43] Honor's ruling.

The Court: Yes.

Q. What improvements did the Forest Service contemplate making to this road at the time, on October 22nd, 1943? A. They——

Mr. Metzger: If Your Honor please, I must rise again to object, because I think that question is wholly improper, what improvements the Forest Service contemplated.

The Court: Well, the question goes, I take it, as to the kind of a road they expected to build there.

Mr. Metzger: Yes, but who was the Forest Service? Is this the Department out here, or is it this Mr. Watts, this chief of the Forestry Service in Washington, D. C.?

The Court: Objection will be overruled, Mr. Metzger, and exception allowed, and we will proceed.

Q. You may answer the question.

A. The Forest Service were going to reconstruct the road according to their one and one-half lane

(Testimony of Lester M. Edge.)

minimum standard. That is a 20 foot roadbed, exclusive of ditch. They were going to clear, in addition to that, [44] on each side, beyond the shoulder, about five feet, to let in more of the sunshine, so that the roadbed would dry out. They were going to surface it sufficiently to sustain heavy logging traffic from the forest to the north.

They were going to repair, replace—repair and replace those bridges in such shape that it would sustain the amount of traffic.

Q. Now, I beg your pardon, had you finished?

A. I am through.

Q. Now, how much of that work has actually been done?

A. The Stevens Creek Bridge has been replaced, with the exception of the wheel guards have not been installed. That is a two-lane bridge, and it is 150 feet in length. It has pile—treated pile piers, Western Red Cedar caps, Douglas Fir stringers, and Douglas Fir planking for the deck.

The O'Brien Creek Bridge, or trestle, has been replaced with a large re-enforced concrete culvert. It has two openings, six by eight feet, and is 155 feet in length, and there has a fill been put across there, containing about—over 16,000 cubic yards.

The west forks of the Humptulips Bridge, the bad stringers—the five stringers have been replaced. Those piling that were bad, or needed replacing, were [45] replaced. Those that could be repaired were repaired. There were about thirteen in all. Sway bracing has also been repaired on that bridge.

(Testimony of Lester M. Edge.)

However, the wheel guards have not been put in yet.

Dry Ravine Bridge has been redecked. Wheel guards are not on that one.

Donkey Creek Bridge No. 1 has just been repaired in a few spots where there has been broken or decayed deck planking.

Donkey Creek Bridge No. 2, the deck has been replaced—deck and the deck joists, and:

Donkey Creek Bridge No. 3 has been—deck joists have been replaced and the deck also has been replaced. There has been some spot graveling the full length of the road, in places that had started to break through.

There has been a small amount of brushing done on the sides, and that is about all that has been done.

Q. What was the cost of replacing Stevens Creek Bridge, and furnishing—putting in the fill and the culvert in the place where the O'Brien Creek Bridge, or trestle, was?

A. Stevens Creek Bridge cost about $5,000.00. I believe it was between $4,500.00 and $5,000.00—the exact [46] figures are in the office of the Olympic National Forest in Olympia.

On O'Brien Creek, the culvert cost a little over 29,000 yards. That culvert there contained 420 cubic yards of Class A concrete. It has 26 tons of reenforcing steel in it, and a little over 16,000 cubic yards of compacted fill. There is a large cut on either end of that job there, and it necessitated surfacing of about a quarter of a mile of the road there, and it was necessary to put in about a thou-

(Testimony of Lester M. Edge.)

sand yards of surfacing. That is pit run surfacing on it.

Q. You refer to some figures, something slightly in excess of 29,000. What were you referring to, yards? A. $29,000.00.

Q. $29,000.00? A. Yes, sir.

Q. And that is the approximate amount expended by the United States Government on the O'Brien Creek Bridge or trestle?

A. That is right.

Q. And do you know how much has been spent in repairing these other bridges?

A. There has been about $4,000.00. It would be rather difficult to give the exact figures that was expended on each one of those structures, but altogether there [47] was a little over four thousand. Now, that did not include about 25,000 board feet of 4 x 12 planking that was cut last winter by the army engineers, in the course of their training. That is not included in that figure.

Q. What is your figure again?

A. About 22,000—22,000.

Mr. Metzger: 22,000 what?

A. Board feet of planking.

The Court: But, in dollars, what is it in dollars?

A. Well, I think that type of planking cost about $44.00 a thousand.

Q. How much—have you an estimate as to all the money that the Forest Service has spent so far in improving this road? A. Yes.

Q. How much is it?

(Testimony of Lester M. Edge.)

A. It is a little over $38,000.00.

Q. That includes the road as well as the bridges?

A. That included all the work that has been done on that road.

Q. And have you made an estimate as to the total cost to the Forest Service, of the improvements that are contemplated as you have testified to a few moments ago? A. Yes, sir.

Q. What was your estimate?

A. On lines "A" and "B"—now, these are total costs, including what has been spent. Lines "A" and "B" for the bridgework, the surfacing and clearing, replacement of culverts, improving drainage, I estimated it would cost about $66,577.00.

Lines "C," "D," "F," "L," "J" and "K," I estimated it would cost about $20,933.00.

Total betterment costs for all roads, involved in this order of taking would cost, I estimate, $87,510.00, and I have the actual funds spent to date, Forest Service funds spent to date on lines "A" and "B," which is all funds that have been spent, is $38,178.00, and total uncompleted work that was contemplated on work, costing $49,340.00.

Q. What is that last figure?

A. $49,340.00.

Q. Did you view these bridges some time close to October 22nd, 1943? A. Yes, I did.

Q. Speaking as of that date, and assuming that none of the bridges have been replaced or repaired at that time, what, in your opinion, would have been the life span in [49] terms of years or remain-

(Testimony of Lester M. Edge.)

ing life span of the Stevens Creek Bridge, and that——

A. That was nil. That bridge was unsafe for any type of traffic.

Q. What would you say as to the O'Brien Creek Bridge, or trestle?

A. O'Brien Creek Trestle was unsafe until extensive improvements would have been made there to that north approach.

Q. What would you assume the life to have been, speaking as of October 22nd, 1943?

A. About five years.

Q. That is O'Brien Creek Bridge?

A. That is O'Brien Creek.

Q. You mean, it would last five years with or without the improvements?

A. With the improvements.

Q. Actually, the bridge was torn down, was it not?

A. Yes, sir, the bridge was removed, and this culvert replaced, because we felt that the money that would be expended—the amount of money necessary to be expended to improve it might just as well be put into a permanent structure.

Q. How long would the bridge have lasted if there had been no improvements? What would its life have been? [50]

A. That would have depended very much on the weather during the following winter. It was my opinion that the next rainy season, that that north approach would have slid out.

(Testimony of Lester M. Edge.)

Q. And did you form any opinion—have you, again speaking as of October 22nd, 1943, as to the remaining life in terms of years of the West Forks Humptulips and the Dry Ravine, and the Donkey Creek Bridges 1, 2 and 3, October 22nd, 1943?

A. There are piling, and caps, and stringers, with the exception of the five that were replaced in the West Humptulips Bridge, all those structures have in my estimation, of about 1943, would have lived about six or seven years.

Mr. Keenan: I think you may cross-examine.

Cross-Examination

By Mr. Blair:

Q. Mr. Edge, you say that as the engineer of the Olympic National Forest, you plan roads for fire protection and administration, as well as logging?

A. Yes, sir.

Q. Is that correct, and in any forest, irrespective of the age of that particular forest, it is necessary to have roads for the purpose of administration and fire [51] protection of the forest?

A. Yes, sir.

Q. Now, in rebuilding bridges, particularly that of O'Brien Creek Bridge, which you said might have had a remaining life of five years, but you determined to rebuild it now. You rebuilt that bridge for heavy logging traffic, didn't you?

A. Yes, sir.

Q. And that is for the purpose of removing the timber in the Olympic National Forest to the north of these roads that are being taken?

(Testimony of Lester M. Edge.)

A. Well, for timber removal, and as I said, fire protection, administration. I don't remember whether I mentioned recreation or not, but they have in mind quite a recreational development along the West Humptulips River. In fact, at the present time in Section 20, and that road that is going that way, there is a center strip being left 200 feet on either side of the logging road, so that culvert—it was not a bridge, the O'Brien Bridge was a big culvert and fill—it wouldn't really make any difference, the construction there after it was put in, it would sustain any traffic, not necessarily logging alone.

Q. And it is the purpose then to put in a recreational facility there in Section 20? [52]

A. Not exactly a facility. It is just to improve the scenic values, or aesthetic values along the road by leaving that 200-foot strip on either side.

Q. I thought you said that was going to be a recreational facility?

A. I said it was the road that is being developed up the West Forks of the Humptulips, with the idea of recreational facilities in mind. The chances are—it is possible for the Forest Service to develop camp grounds. That is, they build tables and fireplaces and sanitary facilities at certain spots that will be likely to be enjoyed by fishermen or recreationists or hunters or anybody out over a weekend, that wants to get out in the forest. That is a development of their own.

(Testimony of Lester M. Edge.)

Q. They will invite fishermen and hunters and campers in this area?

A. Yes, sir, that is definitely in mind.

Q. To the north of—as we go into the forest, what quantity of timber have you figured will come down over this road that is being taken here now?

A. Conservatively speaking, it would be around a billion feet.

Q. Around a billion, conservatively?

A. Conservatively speaking.

Q. What is the upper figure? A billion is your lower [53] figure. How high may the quantity go?

A. Well, that timber in there has not been cruised. I made the reconnaissance through there in December, 1943. I spent a month in there, all of December, and I was up and down the full length of the boundary and I would say the volume of timber will range between a billion to a billion four hundred million.

Q. Are you familiar with what the Forest Service designates as the West Humptulips working circle?

A. Well, that lately has been changed. I haven't a very good idea of where it is.

Q. That generally is the body of timber that will be tapped by this road, isn't it?

A. Well, now, yes, very closely.

Q. Yes. Mr. Edge, what is the difference, generally, between what may be called a green road and what may be described as a seasoned road?

A. Well, a green road would be any road that

(Testimony of Lester M. Edge.)

probably had been built for less than a year. I think that after a year's time a grade is pretty well set. That is the way we figured on railroad construction. We used to let the grade set from eight to twelve months before we laid steel on it.

Q. As a matter of fact, that railroad grade improves with use and age for a number of years, doesn't it? [54]

A. That depends on how the maintenance has been kept up. If the road has been maintained, drainage kept open, and—well, the drainage kept open, yes, it will improve to a certain extent, yes.

Q. And it becomes what is known as a seasoned road bed? A. That is right.

Q. The railroad road bed is when the ties and rails are removed, is generally speaking a very desirable bed for a truck logging road, isn't it?

A. Well, I don't know. I have had this experience with old logging grades and old railroad grades, that where those ties have been tamped, the ground or the material ballast beneath those ties have been tamped in there, and that material below the ties is very much more compact than the material between the ties, and unless you do considerable ripping there, sometimes you have even got to go down as far as two feet. If you don't do that, your road bed will develop a sort of a washpan effect on top—washboard effect on top. It really takes more maintenance, and for a few years after a railroad grade has been converted, than an ordinary grade. Now, that has been my experience.

(Testimony of Lester M. Edge.)

Q. It might take more dragging of the surface?

A. That is right.

Q. Just dragging of the surface? [55]

A. That is right.

Q. And the problem is overcome entirely if you drag the surface until those pockets fill?

A. Sometimes you put in a ripper. That is a machine with big teeth on it that you drive into there and tear it up and then you regrade it, and sometimes your ripper does not take out that washboard effect.

Q. But generally speaking, an abandoned railroad grade—that is a railroad grade where the ties and rails have been removed, is a desirable grade to use for a logging truck road, isn't it?

A. Yes. I wouldn't say from the road bed standpoint. I would say from a standpoint of grade and alignment.

Q. Now, on this particular road, because it was built for railroad logging, it has a fixed maximum grade in throughout the whole of the road, hasn't it? A. Yes, sir.

Q. Do you know what that maximum is?

A. No, it is very low, around two or three per cent.

Q. And from place to place throughout that road, there are places where the side tracks were on the railroad? A. Yes.

Q. And those places, the road is substantially wider than your sixteen foot crown?

A. That is right. [56]

(Testimony of Lester M. Edge.)

Q. Ordinarily, the matter of brushing out the right of way and keeping up the ditches on the road is a matter of maintenance, isn't it?

A. That is right.

Q. Something you have to do annually, no matter what type of road, in order to keep it up?

A. Yes, sir.

Q. And there is also a certain amount of maintenance work to be done on wooden bridge structures after three or four years old?

A. Yes, sir.

Q. And such a matter as that slide on the O'Brien Creek Bridge is a matter that has commonly to be taken care of by maintenance?

A. That one on the O'Brien Creek Bridge, that would be more than maintenance.

Q. You would have considered it more than maintenance?

A. Yes, sir, because that was a major job.

Q. What would that major job have cost?

A. Well, that would be rather hard to estimate, because I was not familiar with the formation underneath. I think there was some reason for setting that crib there on top of the ground. The way it was put in there, it was not a very good job. Now, maybe there was bed rock or something in there that I don't know anything about. [57]

Q. You don't know anything about it?

A. I wouldn't say what the cost of that piece of reconstruction would have been, because I did not look at it from that angle.

(Testimony of Lester M. Edge.)

Q. You couldn't make any estimate of that?

A. I wouldn't attempt to make an estimate on that.

Q. What, generally, is the nature of the country south of the forest where these roads are situated, what type of forest road is on that country?

A. Well, it is cut over land, part of it has been artificially re-seeded. The reproduction or the small trees along the railroad grade are fairly dense, but as you get out in the area, why that growth rather thins out. Now, this is just my opinion on that. I haven't looked at it really from the standpoint of the Forest Service. I just looked at it from the standpoint of the road.

Q. You have not examined that from the standpoint of a forester?

A. No, that did not become part of my job. I have just been interested.

Q. You don't know what class of reforesting along that is? A. No, I don't.

Q. Do you know how they classify lands for reforestation purposes?

A. That has been a rather long time. I had a little bit of [58] that in school. That is all I know about it. Ever since I left school I have been hooked up with roads, and I would rather not attempt to describe it to you. I know there is such a classification, but I couldn't tell you to be accurate about it.

Mr. Blair: That is all.

(Testimony of Lester M. Edge.)

The Court: Anything further of this witness, Mr. Keenan?

Redirect Examination

By Mr. Keenan:

Q. How much have you figured it would cost to maintain this road for a year, just ordinary maintenance?

Mr. Blair: We object as immaterial, Your Honor.

The Court: I think I will sustain the objection to that question. It involves so many other factors.

Mr. Keenan: That is all, then.

(Witness excused.) [59]

WARD W. GANO,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Gano?

A. Ward W. Gano.

Q. And how old are you?

A. Thirty-two years.

Q. And are you employed by the United States Forest Service? A. Yes.

Q. And in what capacity?

A. As structural engineer.

(Testimony of Ward W. Gano.)

Q. And have you had college training in engineering?

A. Yes, I have a Bachelor of Science degree in civil engineering.

Q. From what school?

A. University of Washington.

Q. And when did you finish the University of Washington? A. In 1934.

Q. What did you do upon finishing?

A. I went to work for the United States Forest Service in Portland, first, as an engineering draftsman up until [60] 1936, when I was raised to a junior engineer, for two years, to 1938, and from 1938 to '39 I was an assistant engineer, and from 1939 till '42 as assistant engineer, and then to associate engineer. Since 1942 to date.

Q. And have you any work to do in connection with bridges?

A. Yes, that is my job, is the design and the general supervision of the construction and maintenance of bridges, lookout towers, and other structures.

Q. For the Forest Service?

A. For the Forest Service, yes, sir.

Q. And you are attached to the Regional Forest Service—Regional Office, are you not?

A. Yes, sir, Region 6.

Q. What territory is included in Region 6?

A. The States of Oregon and Washington, with the exception of two counties, Stevens and Pend-Oreille, and the northeast corner of Washington,

(Testimony of Ward W. Gano.)

and also including the Del Norte County in Northern California.

Q. Have you designed any bridges for any one outside of the Forest Service? A. Some, yes.

Q. Who have you designed bridges for?

A. The Weyerhaeuser Timber Company, Ostrander Railroad & Timber Company, Pope & Talbott, Forest Products Treating Company, and Thomas & Jackson, and Seldon Logging [61] Engineers. That is all that I recall at the present time.

Q. Have you examined the property that was condemned in this case? A. I have.

Q. When did you make your examination?

A. In February, 1942.

Q. Made any examination since?

A. Yes, I examined it again in September of 1945.

Q. Well, what was your purpose in examining the property the first time?

A. The first examination, the purpose was to inspect the condition of the bridges and determine their safety for log traffic.

Q. For what purpose were these bridges originally built?

A. They were originally built for a logging railroad grade, and have been subsequently converted into a truck road.

Q. Now, what condition did you find the Stevens Creek Bridge at the time you first examined it?

A. In a dangerous condition to any logging truck traffic, at a very advanced stage of decay. The log

(Testimony of Ward W. Gano.)

crib piers were—had decayed to the point where there was local failure crushing at the bearing points. The stringers had an average of six-inch decay on the outside surfaces, which did not leave very much sound wood for load [62] capacity.

Q. Speaking as of October 22nd, 1943, assuming that Stevens Creek Bridge was in place then, what would you say its normal life would be from that date, October 22nd, 1943?

A. I would say it had no life as a log truck bridge.

Q. Well, assuming that a logger was going to use that bridge and it had to be replaced, did you form any opinion or make any estimate as to the cost of replacing it with a suitable structure for just strictly logging purposes?

A. Yes, sir, I did.

Q. What in your opinion would it have cost to have reconstructed that bridge with a suitable bridge, which would do the work for a logger?

Mr. Metzger: Object, if Your Honor please. His opinion is immaterial. We have testimony as to what it did cost.

The Court: Objection will be overruled, exception allowed.

A. I had made an estimate on the replacement of the bridge, considering the long term economy—that is, using creosoted material where desirable. The total estimate for it was $6,000.00.

Q. How much would that be cut down if you eliminated [63] creosoted material?

(Testimony of Ward W. Gano.)

A. I would roughly estimate $1500.00.

Q. Did you at any time make an estimate as to the cost of replacing—strike that question, please.

Again speaking as of October 22nd, 1943, what would you have assumed the remaining life of the O'Brien Creek Bridge or trestle to be?

A. I would have given it no remaining life.

Q. Did you ever estimate the cost of replacing the O'Brien Creek Bridge, or trestle, with another bridge or trestle?

A. Not with a bridge or trestle, with culvert construction.

Q. Why was a culvert construction used by the Forest Service rather than replacing the bridge?

A. In order to get the cheapest structure from a long-term standpoint. We could have replaced it with timber construction—that is, to the same standard as the original trestle, but it was not considered on an analyses of cost, that was the cheapest thing to do.

Q. What would be the normal life of one of these bridges, or trestles, if untreated material was used? I mean, normal life—entire life span of a new bridge of the same construction?

A. Roughly, fifteen to twenty years.

Q. Will you give us the remaining life of those other [64] bridges from the Dry Ravine Bridge and the three Donkey Creek Bridges, speaking as of October 22nd, 1943?

A. Of course, that is a matter of opinion on those things. It is difficult to tie every remaining life—

(Testimony of Ward W. Gano.)

to tie it down positively, but I would estimate six years or seven years.

Q. In that six or seven-year figure, does that apply generally to those five figures?

A. To the five figures, yes, sir.

Q. How much would it cost to maintain these bridges per annum?

Mr. Blair: We object as being wholly immaterial, Your Honor.

The Court: Of course, I assume that the question implies the use to which they were being put in 1943, or the use to which the Forest Service intended to put them.

Mr. Keenan: I was asking the question, Your Honor, as it has a bearing on benefits. I think that I should distinguish between the two situations in question, and I will withdraw the question, if the Court please.

Q. Assuming that the cheapest type of construction—strike that.

What would you assume the cost of maintenance would [65] be on these bridges as they existed, when you first saw them and as of October 22nd, 1943?

Mr. Blair: We object to that, Your Honor, as being wholly immaterial. I don't know——

The Court: Objection will be overruled and exception allowed.

Q. All right, to clarify the issue, Mr. Gano, I am not assuming any culvert at the O'Brien Creek Bridge.

A. The cost of maintaining them alone, to keep

(Testimony of Ward W. Gano.)

them in the same condition suitable for log traffic——

Q. That is what I mean, and assuming, of course, the structure was in such sound condition that it was worth while to put some maintenance on it.

Mr. Metzger: We object, Your Honor, please.

The Court: I think I will sustain the objection to the question. I think there is too much hypothesis in it.

Q. And assuming, Mr. Gano, that the Polson Logging Company kept this road, and had to maintain the bridges on that road, what would it cost per year, in your opinion, to maintain those bridges properly.

Mr. Blair: Same objection, Your Honor.

The Court: Oh, I think he may answer. The jury will understand, of course, this is merely an estimate and there may be many factors involved. I do not [66] know whether the question implies the hauling of it being done at the immediate time, or the hauling was contemplated to be done on it independent of any products coming out of the forest.

A. The best estimate—I have given some thought to what a reasonable, prudent operator might do towards the standard of replacement for the cheapest over-all construction—cheapest over-all cost, and for the seven bridges it is very probable that at least four of those could be eliminated by fill and culvert construction, in order to get the longest —the cheapest longest term cost, which would leave

(Testimony of Ward W. Gano.)

three bridges, which as of 1943 would be replaced within a short period, and roughly that estimate totaled $67,000.00 for the elimination of four bridges and the replacement of three.

Mr. Metzger: If Your Honor please, I move to strike this answer as not responsive.

The Court: I do not think it is. I think I shall grant the motion. The jury are instructed to disregard it. I do not think the witness understood the question that was propounded.

Q. I am asking, Mr. Gano, if, assuming the bridges were left in place, can you—and assuming, too, that the traffic was fairly light.

A. Around $350.00 to $400.00. [67]

Q. Per annum?

A. Per annum, yes, sir.

Q. That three hundred and fifty to four hundred dollars, that is assuming logging over on the bridge?

A. Just light traffic conditions. In heavy logging conditions you would have to up that figure considerably.

Q. How much, can you tell us?

A. Rough estimate, double it.

Mr. Keenan: You may cross-examine.

Cross-Examination

By Mr. Blair:

Q. Mr. Gano, at the time you first became acquainted with this highway that is under condemnation, it was then being used to truck logs?

A. That is right.

(Testimony of Ward W. Gano.)

Q. Although you felt at the time from your examination of two of the bridges, that it was probably not a very—not very good shape for operation?

A. It was not in safe shape for operation.

Q. But, they were trucking logs over them?

A. Yes, sir.

Q. And the people trucking logs over, were people other than Polson Logging Company?

A. Yes. [68]

Q. That is, there were other loggers who had made arrangements with Polson Logging Company to pay a fee for the use of this road?

A. I don't know about those arrangements. I am acquainted with the fact that it was not only Polson Logging Company that was hauling logs.

Q. And it is a common thing in the logging business for loggers to pay a fee for the use of a logging road, owned by another party?

A. That is not my business.

Q. You are not familiar——

A. I can't very well testify to that.

Q. Are you familiar with the body of timber that was expected to come out on this road to the north? A. No, I am not.

Q. Assuming that there is a billion to a billion four hundred million feet of timber in there, and that timber could reasonably pay a dollar a thousand for coming out over that road, which would amount to a million to a million four hundred thousand dollars, do you think the maintenance fee of

(Testimony of Ward W. Gano.)

$900.00 a year to maintain that road would be very serious in the eyes of the owner?

Mr. Keenan: The question is objected to on the ground it is not shown that the Polson Logging Company owned any such body of timber, or any timber that would [69] come out over this road, and what the maintenance fee would be, if the Forest Service timber comes out, is certainly not in issue.

Mr. Blair: The witness himself testified $900.00 a year for heavy traffic. I don't care who owns the timber, it is a question of how much it is that the owner of the road might be expected to realize.

The Court: Well, I do not think, Mr. Blair, the question of the toll could be an item of measure of the value of this property.

Mr. Blair: It is a measure of its earning capacity, which is one of the factors to be taken into consideration.

The Court: I will take the position it is the objective to make an outlet for forest products, for use of the general public. I think I shall have to sustain the objection to the question, and if you want to make a record I will give you an opportunity to make an offer of proof.

Mr. Blair: Not with this witness, Your Honor. We merely take an exception to the ruling.

The Court: Yes.

Q. You say, Mr. Gano, with respect to that O'Brien Creek Bridge, you thought the culvert type of construction that was used, was over a period of time the most economical, [70] is that true?

(Testimony of Ward W. Gano.)

A. Yes, sir.

Q. And over what period of time did you expect there would be heavy log traffic, or light log traffic, or the hauling of logs over this road—over what period of time did you estimate that traffic would continue?

A. I made no estimate on that, sir. My estimate was based on the fact that the road would be acquired for—we will say a permanent period of time, in order to administrate the line.

Q. Without trying to fix any definite number of years at all? A. That is right.

Mr. Blair: That is all.

Mr. Keenan: That is all, Mr. Gano.

(Witness excused.) [71]

EARL PHILLIPS,

produced as a witness on behalf of the Petitioner, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Stella:

Q. State your name, please.

A. Earl Phillips.

Q. What is your business or occupation?

A. I am a safety engineer.

Q. Where are you employed?

A. Employed by the Army Service Forces in Seattle.

(Testimony of Earl Phillips.)

Q. How long have you been a safety engineer, Mr. Phillips? A. About six years.

Q. What else have you done, Mr. Phillips?

A. 1924 to '25 I worked for the Grays Harbor County Assessor as field man, checking lines, appraising property for tax purposes.

1926 to '27—'26 and '27, I was with the Puget Sound Power & Light Company, and attended the University of Washington at the same time, and then until 1930 I worked—was working in Seattle at various occupations, and I returned to Grays Harbor in 1930.

From 1930 to 1937 I worked at various logging and lumber operations. I worked in sawmills and logging [72] camps, and also during that period of time, I did some independent photographic work, newspaper work, and commercial photography.

Q. How long have you been a commercial photographer, Mr. Phillips?

A. In and out of it ever since I finished school.

Q. You have been for the past five or six years or more, continuously employed as a commercial photographer, or had your own business?

A. No, I have not been in photography at all for the last four or five years. I have been working at safety engineering entirely.

Q. Mr. Phillips, are you familiar with the land in question here, the land that is being taken by the United States, represented by the green line?

A. Yes.

Q. Several green lines on this map?

(Testimony of Earl Phillips.)

A. Yes, sir, I am.

Pardon me, sir, I should—I think I should make a correction there in the answer, that I have not been in photography for the last few years. For the Weyerhaeuser Timber Company, I did considerable photography for them in 1937 and 1939. I did considerable photographic work for the State Department of Labor and Industries fairly recently.

Q. Did you have occasion to visit the lands being taken by the United States?

A. Yes, I have.

Q. When did you last inspect it?

A. 1942.

Q. Do you recall about when it was in 1942?

A. I was there on three different occasions, I believe. I think two of those occasions were in March, and the other one was approximately that time.

Q. Did you take any photographs of the road that was taken? A. Yes, sir.

Q. I am handing you Exhibits 3 to 8, Mr. Phillips, and I will ask you what those are?

A. The first picture, Exhibit No. 3, is that?

Q. Yes.

A. That is in Section 11.

Q. I will ask you what it is, just tell——

A. This is a photograph.

Q. Photograph of what?

A. Photograph of logged off area in Section 11, in the area under discussion, showing the portion of the logging road that was in use by the M. & D.

(Testimony of Earl Phillips.)

Logging Company at that time. It shows the condition of the land generally at that point.

Q. Now, take the next one, Mr. Phillips. [74]

A. This is a portion of the road.

Q. What Exhibit is that, that you are referring to there? A. This is Exhibit 4.

Q. Petitioner's Exhibit 4?

A. Yes, sir, 4. That is a photograph showing a portion of the road under question in Section 9.

This picture shows a portion of the road and typical surrounding area.

The Court: And when were they taken?

A. These have my date stamp of March 14th, 1942.

The Court: I suggest that as fast as they are identified, when you complete your identification, pass them to counsel for the respondent so we will not have the necessity of handing them all to him at once, and having to wait for them. Let's proceed.

Have you finished with that third one for the record?

The Witness: Yes, sir.

Q. Petitioner's Exhibit 4.

The Court: All right, go right ahead.

A. This is Exhibit—Petitioner's Exhibit No. 5, and this is also in Section 9, the same as the last picture. This picture shows a portion of the road, and a portion of what previously was a railroad siding. The ties are [75] still in place, and shows the surrounding logged off area.

(Testimony of Earl Phillips.)

Q. When was that taken—were all these taken the same date?

A. That has the same date, I believe, March 14th, 1942.

This is Petitioner's Exhibit No. 6. This is a fairly close-up photograph of the hillside to the east, looking eastward from an area—or from a position at the foot of the hill, roughly at the point where the road of the M. & D. Timber Company shown in the previous exhibit comes down off of the hill. This is a close-up picture showing the logged over land—stump land.

This is Petitioner's Exhibit No. 7. This picture was taken in September of '41. That was the first trip that I made to this country. This picture shows the culvert, and a portion of the road at the foot of the hill at Newberry Creek, which is located I believe in Section——

The Court: You may step down.

Mr. Stella: You may step down and look at the map, Mr. Phillips, if that will help you.

A. I believe that is Section 6. I am not positive of that answer, of that location. However, it is the culvert at the foot of the hill at Newberry Creek on [76] the road across from Brook Hill over to the logging operation.

This is Petitioner's Exhibit 8, also in Section 11, showing a very small portion of the road and a considerable area of logged off land in burned slash.

Mr. Stella: I offer these in evidence.

The Court: Any objections?

(Testimony of Earl Phillips.)

Mr. Metzger: Yes, Your Honor. I have to interrogate the witness, I think, a little bit more to make the force of my objection, but I object generally to Identifications 3, 4, 5, 6, and 8, particularly, in that they do not show any property involved in this suit, sought to be acquired in this suit, and from the——

The Court: They say generally. Isn't Section 11 in this suit?

Mr. Metzger: There is a road goes through Section 11, but the pictures I believe do not show any part of any road that is sought to be acquired in this action.

The Court: Well, if that be conceded by the petitioner, then of course they wouldn't be competent. Do you agree that these are other roads in that area?

Mr. Stella: That there are other roads?

The Court: No, the pictures. [77]

Mr. Stella: No, he testified that these pictures are particular pictures taken on this road.

The Court: No, he testified they were in Section 11 and Section 6, but he did not identify them on this map, as I recall his testimony.

Mr. Keenan: Those Sections are owned by Polson, Your Honor. The road runs through the Section, and it is typical——

The Court: The objection being made is that it is not this road at all the pictures were taken of. They are making other roads in Section 11 or logging roads or railroads?

(Testimony of Earl Phillips.)

Mr. Stella: He testified the pictures were taken of the road.

The Court: Well, why not ask him the direct question.

Q. Mr. Phillips, I will ask you if the pictures show the road here of Petitioner's Exhiits 3, 4, 5, 6, and 8, 3 to 8 inclusive, are pictures showing the road taken by the United States?

A. They are.

Mr. Metzger: Well, if Your Honor please, in view of that evidence, I ask leave to examine the witness to test the correctness of his answer.

The Court: Very well, you may ask him on [78] voir dire. You may do so.

Pass the pictures to the bailiff. The bailiff will make himself available, and you can keep all of them except the one you are examining on.

Mr. Metzger: Well, Mr. Phillips, can you tell me in what part of Section 11 that picture was taken?

The Witness: That would be in the northeast quarter.

Mr. Metzger: In the northeast quarter, and which direction are you looking?

The Witness: You are looking east, and a little bit north.

Mr. Metzger: East and a little bit north. All right, now, will you come to Exhibit 2, and indicate as near as you can the spot where you think that picture was taken? Step down here and indicate with a pencil.

The Court: Use the colored pencil, a red pencil

(Testimony of Earl Phillips.)

will probably show up better.

Mr. Metzger: A very small mark, where you think that picture was taken.

The Witness: This one?

Mr. Metzger: Yes.

The Witness: You want the camera location?

Mr. Metzger: Yes, the camera location, and then put a little arrow showing the direction it was taken.

(Witness does as directed.)

The Court: Now, you say you want him to place an arrow there?

Mr. Metzger: He has done so.

The Court: Then, he better identify it further.

Mr. Metzger: By a little "3" under that. All right. Which of these roads indicated on Exhibit 2, if any, is shown in that Exhibit 3? Well, you can just answer the question, tell me which one, mark it here.

This is for the benefit of the jury, there is line "H", going up, and line "G", is the second, and the lower one is line "P".

The Witness: I believe it to be line "G". I can't be positive of that, looking at the map I can locate it in that country. I can show you the road on that map. I can't be positive of which of those two it is.

Mr. Metzger: You can't be positive which it is?

The Witness: No, sir. [80]

Mr. Metzger: And as a matter of fact, you don't even know whether it isn't another road there that is not shown on this map, do you?

(Testimony of Earl Phillips.)

The Witness: No, sir, but I could take you to the road and show you the road that is shown in this picture.

Mr. Metzger: Then, I object to this identification because the witness is unable to identify to what it relates.

The Court: I understand your objection is that he is unable to identify it.

He asked you whether this related to some other road than those indicated on the map.

The Witness: Some other than those indicated on the map?

The Court: Yes.

The Witness: I don't believe it possibly could be but one of the roads shown there because the location in—now, you've got me there. I believe that it is one of those roads shown on the map. I can't go any further than that.

The Court: Well, that identification is not very satisfactory. It is a question of what weight should be given to it. Do you think if you had time to examine further maps you could further identify the place [81] you were on, and the picture was taken on?

The Witness: Possibly. I know this road was the road that the M. D. Logging Company was logging on at the time I took the picture.

The Court: I think I shall sustain the objection to the offer of proof on the statement of this witness, but I would not foreclose you from fully identifying it.

(Testimony of Earl Phillips.)

Mr. Stella: As far as that one exhibit is concerned, Your Honor?

The Court: Yes.

Mr. Metzger: Mr. Phillips, please take your Identification No. 4 and indicate on Exhibit 2 where that picture was taken, and the direction in which it was taken.

(Whereupon, witness did as directed.)

Mr. Metzger: You have——

The Witness: Wait a minute, I should have—roughly, at this location (indicating).

Mr. Metzger: You have made a mark in the southeast corner of Section 4, near line "B", looking northerly, is that right?

The Witness: Yes, sir.

Mr. Metzger: Now, at whose request did you [82] take those pictures?

The Witness: Mr. Abel.

Mr. Metzger: Mr. Abel, and you were taking pictures of some roads over which the M. & D. Timber Company was seeking to acquire an easement?

Mr. Keenan: If the Court please, this is not cross-examination. He is trying to show the authenticity of the photograph. I don't think this has any bearing on that picture.

The Court: I don't think so.

Mr. Metzger: I am trying to show he was taking a picture of a road at an entirely different location.

The Court: You may do that, but now you are going into some entirely different matter.

(Testimony of Earl Phillips.)

Mr. Metzger: Mr. Phillips, you say you took the picture as you marked it here, in the southeast corner of Section 11, looking more or less north?

The Witness: Just a minute.

Mr. Metzger: Section 9,—I said Section 9. I meant Section 11. As a matter of fact, that picture is taken of a road and flat on Section 11, not far from where your first picture, Exhibit 4, was taken, of a road that ran down around over to the east line of Section 11, isn't that correct? [83]

The Witness: No, sir.

Mr. Metzger: It is not?

The Witness: No, sir.

The Court: Let's make a disposition of this Exhibit now.

Mr. Metzger: I still think the witness is wrong, Your Honor.

The Court: Well, I assume the Government is still offering the Exhibit?

Mr. Stella: Yes.

Mr. Metzger: I haven't finished on this particular Exhibit.

The Court: I thought you were passing him another. I want to expedite this.

Mr. Metzger: But I don't think it is a proper thing to let this jury have pictures——

The Court: Unless they are identified as of some section of the road involved.

Mr. Metzger: I am satisfied they are not.

The Court: Let's proceed, if you want to identify or examine——

(Testimony of Earl Phillips.)

Mr. Metzger: Will you tell me where you took Exhibit 5, now?

The Witness: This is a close-up of some of the same area that is shown in the previous picture. [84]

Mr. Metzger: Taken about the same place?

The Witness: No, sir, taken at a different camera location.

Mr. Metzger: Would you say it is very close to the same place, a matter of fifty feet or so?

The Witness: A matter of—I would judge not over two hundred and fifty feet.

Mr. Metzger: Not over two hundred and fifty feet, so you would say both 4 and 5 were taken in Section 9?

The Witness: That is right.

Mr. Metzger: Would you say they show this line "B", that road?

The Witness: Yes, sir.

Mr. Metzger: Now, I renew my question, who did you take them for?

The Witness: Mr. Abel.

Mr. Metzger: And you were taking them of a picture——

Mr. Keenan: I object to that.

The Court: Objection overruled.

Mr. Metzger: And you were taking them of pictures of a road that the M. & D. Timber Company was seeking to condemn, were you not?

The Witness: That is right. [85]

Mr. Metzger: That is right.

The Witness: That was my understanding.

(Testimony of Earl Phillips.)

Mr. Metzger: That was your understanding, yes.

Now, I renew my objections, Your Honor please, because it is a matter of record in the Supreme Court of this State, that Mr. Abel in his proceeding, abandoned the taking of anything covered by the Government's taking in this proceeding.

The Court: The sole question is whether these photographs were taken at a time near enough to be material here, and the witness says they were taken in Section 9, but he said he was taking them in connection with another lawsuit, and they were brought here. That does not destroy the effect of his testimony. They can be repudiated if he is in error. Objection overruled as to the exhibits he has identified.

Mr. Metzger: 4 and 5?

The Court: Yes.

(Whereupon, pictures referred to were then received in evidence and marked Petitioner's Exhibits Nos. 4 and 5.)

The Court: 4 and 5 are admitted.

Mr. Metzger: What road or property that is sought to be taken in this suit, is shown by that picture? [86]

The Witness: There is no road shown in this picture.

Mr. Metzger: What property that is sought to be taken is shown?

The Witness: There is no portion of a right-of-way shown in the picture, a road.

(Testimony of Earl Phillips.)

Mr. Metzger: What property—what property is shown in that picture?

The Court: You may step down to the map and indicate where you took the picture.

The Witness: This is a picture—close-up picture of the ridge, Section 11, that the M. & D. Logging Company's road was still on. This was taken just about at the base of that road.

Mr. Metzger: And just shows a hillside?

The Witness: That is right.

Mr. Metzger: We will object as immaterial and irrelevant.

The Court: Will you let me see it?

I am rather inclined to agree with you, if it is.

I am inclined to sustain the objection to this. I do not see that it can add very much.

Mr. Keenan: If the Court please, I fail to see how the jury can intelligently consider this case [87] without some information as to the surrounding cover and the character of the land through which this road runs.

The Court: Well, this road it is testified, runs a distance of ten or fifteen miles, and the picture evidently indicates a region of—very small fraction of an acre.

Mr. Keenan: That, Your Honor, is probably true. Nevertheless I think it is typical cover and I think it can be shown so to be.

The Court: He has not identified it as typical of the entire region, or any particular part of the region, on the identification made, both directly and

(Testimony of Earl Phillips.)

on voir dire. I do not think this is a competent exhibit, and shall reject the offer.

Mr. Metzger: Now, Exhibit 7, Mr. Phillips, will you please indicate on Exhibit 2 where that picture was taken, and the direction in which the camera was pointed?

The Witness: I remember this picture as being taken facing—as I remember, facing north at the culvert and Newberry Creek. Now, on this exhibit I do not see Newberry Creek.

The Court: If you have some engineers that drew this, that such a creek is there, and can identify [88] it, I am going to let you permit him to orient himself.

Mr. Rands: Newberry Creek is right up through here, like this.

Mr. Metzger: Just put a "7" there. Have you marked a "7", so as to indicate which one that is?

And the last exhibit—I beg your pardon, before looking at that, which road does this picture—which road on Exhibit 2 does this picture—excuse me, Your Honor, I beg your pardon,—Exhibit 7 show?

The Witness: This road that comes through this way (indicating).

Mr. Metzger: Line "K", the line—indicate line "K".

All right, I will withdraw any objection to exhibit 7.

The Court: That will be admitted.

(Whereupon, photograph referred to was re-

(Testimony of Earl Phillips.)

ceived in evidence and marked Petitioner's Exhibit No. 7.)

Mr. Metzger: Exhibit 8, where do you say that was taken? Will you please mark it?

The Witness: That would be roughly in this area.

The Court: Speak a little louder.

Mr. Metzger: In which direction was it looking?

The Witness: Looking in this direction (indicating).

The Court: Looking which direction

The Witness: Eastward, I believe, sir.

Mr. Metzger: Make an "8" there, please, Mr. Phillips.

The Court: Is that part of the identification?

Mr. Metzger: Which road does it show, in your opinion?

The Witness: That shows a portion of this road.

Mr. Metzger: Which would be line "B", then?

The Witness: Yes, sir.

The Court: Any objection?

Mr. Metzger: Well, if Your Honor please, on that identification I object as the picture is immaterial and irrelevant and improper. It does not show any depth. It has no competency, or value to the jury. It shows about three inches on the curve of the road, nothing else.

The Court: Objection overruled, and exception allowed, and it will be admitted in evidence.

(Whereupon, photograph referred to was

(Testimony of Earl Phillips.)

then received in evidence and marked Petitioner's [90] Exhibit No. 8.)

Mr. Stella: That is all.

The Court: Those that have been admitted, you better pass them to the jury now, and let them examine. Mr. Bailiff, take these pictures that have been admitted and hand them to Juror No. 1, and he can examine them and pass them on, and bring them back on around. There were four of them, and two were rejected; and Mr. Stella, do you have anything further on direct?

Mr. Stella: Nothing further.

The Court: Do you have any cross-examination?

Mr. Metzger: No, Your Honor.

The Court: You may step down, Mr. Phillips.

(Witness excused.)

The Court: You have no real short witness now, Mr. Stella?

Mr. Keenan: No, I do not.

The Court: I expect to adjourn very quickly now.

Mr. Kennan: We haven't any short witness.

The Court: I thought you might have some witness, just on some formal matter that wanted to get away.

Mr. Keenan: I think we have only one short [91] witness left, and we will have him here the first thing in the morning.

The Court: Now, ladies and gentlemen of the jury, we have worked right through since 1:30, because—and I told you that we would adjourn a little

(Testimony of Earl Phillips.)

bit early, and I am going to keep my word in that respect and you will be excused now to report back at 10:00 o'clock tomorrow morning,—and I said ladies and gentlemen of the jury—I did not mean that; we have an all-man jury, which has been rather unusual and you will remember the admonition I gave you. If any one asks you what you are doing, you are sitting as a juror in Federal Court trying a condemnation case and beyond that you better not go, so you get into the realm of what people tell you, what they think about it.

You are now excused.

(Whereupon, the jurors retired from the court room.)

The Court: Now, there are apparently at least two legal matters that should be disposed of. I think before we go much farther in this case, and we can expedite it by making a disposition of it, and one is as to whether this is a public road, so that the owners of contiguous lands and everybody else, [92] except under such restrictions as the Forestry Service inaugurates on their highway, might make use of it, and it is the contention of the respondent that it is not such a road, and I understand it is the contention of the petitioner that it is. Is that correct, Mr. Keenan and Mr. Metzger?

Mr. Metzger: We think it is a private road exclusively, like the road in Mt. Rainier National Park where the Government controls it, and admits people as they see fit, and they have so exercised that right

by putting up gates and keeping them locked on this road since the taking.

The Court: Well, of course, I am not here to determine whether they have a right to put up gates, or did not put up gates.

Mr. Metzger: That shows their interpretation of their right.

Mr. Keenan: As long as you are talking, Polson Logging Company tried to kick me off the road with their watchman.

The Court: It is not a question for this Court to determine whose rights there are there as claimed now, but from these pleadings and from this declaration of taking, whether or not it is broad enough to cover this generally—and I don't know whether I have [93] the last declaration of taking, the one filed on October 22, 1943——

Mr. Keenan: November 12th, mine is marked, 1943.

Mr. Metzger: November 12th is the last one.

The Court: Yes, I have it now.

Mr. Keenan: In the paragraph which I have before me, Your Honor, is labeled "B", a small "B".

The Court: Yes.

Mr. Keenan: Might I call this Court's attention to some of the language there, about half way down in the paragraph, "And prevention and extinguishment of fires therein, or adjacent thereto, and for use as a permanent highway for all said purposes, and for the use of the people of the United States generally for all lawful and proper purposes".

The Court: Yes, that is the language that I have.

Mr. Keenan: Then, it goes on:

"Having regard to the geographical, topographical and other conditions of said forest, and lands in the vicinity thereof, which affect the welfare and safety and preservation of the forest".

Now, obviously, that road, and I think almost any other road can be closed to prevent a fire hazard, [94] and reasonable precautions can be taken to close any road in the public interest, temporarily, and if it were otherwise, the Polson Logging Company would be in court protesting greatly. They have land in there—cut over land which I assume they do not wish to have a fire in, and it might be necessary to close this road to keep people out of the woods within this township and adjacent to that road.

The Court: I do not think I have any difficulty in holding that this is a public highway with a certain limitation—that is, the limitation that the Forest Service will exercise jurisdiction of it in the matter of what they consider the public welfare of closing it against hazards, but the general public are entitled to make use of it except when they determine such a hazard exists, so they handle it the same as any other forest road that is open to the public, and of course the Court takes judicial notice of the fact that they are not only forest roads within the forest that are under their control. There are likewise public highways in the various states in which the forests are located, maintained by the states that go through the forest in many instances,

that the forest people maintain. In some instances, the state maintains them, so the question that might be of some high concern here is, "Could [95] the respondent say that he was going to have no benefit by reason of the well known restrictions that the Forest Service sometimes place upon their highways?"

Mr. Keenan: Isn't that a question of fact, Your Honor?

The Court: Well, that is what I was just wondering, and if it would not take some proof on what restrictions—I will hear from you, Mr. Blair and Mr. Metzger, if you differ with the Court. This is material only, of course, in reference to whether this would be any benefit offset as against any damages that are sustained.

Mr. Blair: Here is our position on that matter, Your Honor: If the State or the United States were condemning this property for use as a public highway, then concededly that benefit rule would be applicable. It is our contention that this condemnation is made for a special purpose, and it is made under statutes that give them the power to condemn for special purposes, not to open a public highway at all, but to open a road into this national forest. That is where they get their power to condemn the property, if they have any, and to compel us to submit to the reduction of our just compensation, and to have supposed benefits offset against us, it must be clear, not that we may [96] probably have the right to use this road some time, or we may through some-

body's concession be permitted to use it, we have got to have the legal right, the same as any member of the public, to the use of that highway, as a public highway.

The Court: Of course, you would have the same right as any other member, there is no question about that, but the general public might have a restricted use. You have the same right as any one else would have.

Mr. Blair: We would have the right to have the logs hauled out over that road, because the evidence would be this land has no value at all except for growing a new forest. We couldn't possibly have any benefit, unless we are permitted to use this road as a fire patrol and logging road, and certainly there is nothing in this condemnation and under this taking that is going to assure us of any right to use that as a logging road, as from time to time our forest, or any part of it, should be harvested, and certainly unless that is shown, there is no benefit involved here.

The Court: Well, I admit that it presents to me rather a close question as to whether we can have offsets—supposed benefits—that does not however follow if you cannot offset benefits that there still [97] would be nothing left to estimate in the way of damages, because you have here a constructed railroad grade in some degree of development, and you had some bridges that had some value, and you have your—I am not suggesting because I do not know what turn the evidence will take—some dam-

age that might be asserted because a certain piece of land was cut in two, or something of that kind. Anyway, those are all questions that come into the case that I would like to settle outside of the hearing of the jury, and without the necessity of taking time for extended argument. The issue as to whether or not this is a road under construction and condemned, or taken, under such circumstances that would fall within the provisions of both statutory and common law of the State of Washington, wherein benefits may be offset against losses sustained, that is the one thing. The other that I would like to settle is this issue that has just been suggested slightly here in the course of the afternoon, that you were going to claim compensation based upon toll values of the hauling over the road from the National Forest to the public highway, and if you have some authority you want to cite to me on that, if there is any——

Mr. Metzger: There is on this first question, if Your Honor please, before we pass that. Let me say [98] here as I said there in the argument while the jury was present, there isn't any authority in the Secretary of Agriculture having acquired this road, to dedicate it to the public, and counsel for the Government hasn't come forward to dispute that statement.

Now, I take—make the contrary—the converse statement, which Your Honor will recall has been made in this matter many times before, the statute

prohibits the enlargement of the National Forest, except by special act of Congress.

Now, if this acquisition is to be an acquisition as a—something for the public, outside the forest as a general acquisition for the public good—the public generally, then it runs in my opinion, right squarely counter to the proposition that the boundaries of the Olympic Forest cannot be enlarged without special act of Congress.

The Court: Of course, this Court passed upon that, whether rightly or wrongly.

Mr. Metzger: The point is here, if they take it as a means of access to the forest, and limit it that way, that would be good, but when they come along and now seek to contend that they are taking it as a general good for the public, generally, then they are adding to the public domain—adding for the benefit of the public, [99] and they are running counter——

The Court: Now, I cannot follow you in your reasoning there, Mr. Metzger. The forest itself was created for the benefit of the whole public, not for the benefit of the respondent in this case, or anybody else who happened to own land that lay contiguous to it. That is, they should not be permitted, and it was never contended and cannot be, to have an exclusive domain in the National Forest, that deprives others of an equal right to the use of it by reason of the fact their land joins it.

Mr. Metzger: That is true.

The Court: And the question that I have here now, is whether this road, primarily, for the pur-

poses set forth, and the Court has had to give a broad construction to the language of the basic act that created the National Forest, is for the purpose of giving the Government egress and ingress to a National Forest that was set up for certain definite purposes, the major perhaps among them, is to furnish a continuous supply of timber through the years and generations, others, recreation, and others are water control, and water shed protection, and a number of other things that I do not need to mention. The declaration of taking here follows in a general way the [100] language of the basic forest act, dating back to 1893 or '94, whenever it was—I can't give the date, but it includes all of these objectives and purposes.

Now, does that constitute a public highway so that not only people who buy timber in there, but everybody who may come that way, has a right to go in and come out, when they were under such conditions as they desire, excepting in such protective provisions as the act provides for all forest roads and forests—that is the question here, and if it does, of course the Polson Logging Company, with lands contiguous for ten or fifteen miles on either side of this road, can drive onto it whenever they want to, or off of it, and if they can, then they would be under it, giving application to the State law, they would be entitled to—chargeable with benefits that they may derive if any, as against damages they may sustain.

Now, that is the problem.

Mr. Metzger: That is the problem, but on the

other hand, as I tried to say and I hope I make myself clear, that if the taking is that broad—if the taking is of a highway to be maintained outside the National Forest for the benefit of the land owner through whom that land runs, with respect to his lands——

The Court: Well, for his benefit and everybody [101] else's benefit.

Mr. Metzger: Well, if it is to be maintained, then the only thing that can be is an addition to the area of the National Forest. If the power exists, which we disagree on, as a matter of fact——

The Court: I appreciate that.

Mr. Metzger (Continuing): If the power exists, it is a power limited to providing ingress and egress, and purposes connected with the forest. If that is the extent of the power, then this declaration cannot be construed to go beyond the extent of the power.

The Court: In establishing a public highway.

Mr. Metzger: In establishing a public highway, and if the power is limited to the private use, that is, for the benefit of ingress and egress to the forest, then there is no question of a public highway for Polson to be able to use and enjoy for his own land, outside.

Mr. Blair: It seems to me, Your Honor, there may be this practical answer to the problem we are confronted with here. We all recognize that the respondent land owner is entitled to just compensation and full compensation, and that it should not be whittled down by benefits, unless, certainly, he

just have those benefits. I think this road, so far as it being a public road, is no different than any other forest road. It is, or it is [102] not in the same category as other forest roads.

Now we know, and I think counsel will concede, that as a matter of ordinary practice, the Forest Service does impose charges for use of their roads by private logging operators, just as a matter of practice. If that is true, if Polson is going to have to pay a toll—whether they do or not, if he can be either excluded or made to pay a toll, then there is certainly nothing of the character of benefits. He is entitled to the compensation that he would receive if somebody took the road and closed it and never permitted another vehicle to travel over it. That is the compensation he is entitled to if the United States, after this taking, has the power to produce that result.

If, as a matter of ordinary practice, they do impose charges for use of their Forest Service roads, as they do, I believe then that ought to be the answer to the question now before the Court.

The Court: I do not know if they do. If they do—if either——

Mr. Keenan: I don't understand the Forest Service imposes charges. In any event, they do sometimes where private operators—have the operator, where he is using the road exclusively, do the ordinary maintenance. In other words, he does the maintenance on [103] the road and fixes up the damage he does by his logging trucks. Where several operators use the road, they usually share the

expense of maintenance, and that expense of maintenance is that extra maintenance which results whenever a road is used for heavy logging traffic. There is no charge as such. There is no profit to the United States. It is simply a question of where the operator of these logging trucks takes care of the maintenance—the extra maintenance that his trucks have caused, but he is still freed from any outlay in the way of capital expenditure on road improvements and such, over a period of time. It is just the slight amount of damage that he does over the interim. That is my understanding.

One other question was raised by Your Honor.

The Court: Well, this question of whether damages or benefits can be offset, I am rather inclined to doubt whether they can.

Mr. Keenan: I don't think there is any question but what——

The Court: If this is a public highway, but this is not in the full sense a public highway. This is a highway for the benefit of the public in the uses of the National Forest.

Mr. Keenan: Quite true, Your Honor, but it [104] is also a highway to prevent fire, and we know one thing in spite of all the logistics——

The Court: I can see the difficulty in the interpretation of this question. That is why I want to take this time of the jury. If the argument is made by the respondent, his place is cut in two, and he will never be allowed to go upon this highway, and be excluded from it, and of course then the

measure of damages would be far more substantial. On the other hand, if the Government takes the position that this highway is open to him to haul ten, twelve or fifteen or twenty-ton truck loads across it without hindrance, then he certainly should be charged for the benefit that comes from such use. Neither of those situations can logically be contended for. I think the Court is warranted in taking judicial notice of that. In the first place, the owner of continguous lands has exactly the same right as everybody else does. If he lives a mile from where the road ends, he can drive on to it there, or if he lives ten miles he can drive on to it. He can't use it in such a manner as to destroy it. He couldn't do that with a state highway, because that can be limited and is limited, put caterpillars on there and tear the road up—do those things, but the question that is more serious, is whether I shall attempt to, or [105] shall determine that this is a valuable improvement to the Polsons, themselves. That is what the effect of the benefit would be here, of this respondent, by reason of the Government's expenditure of $298,000.00, or $100,000.00 that has been testified that they are going to spend, and they have already spent a substantial portion of it, and the jury must weigh and consider what added value has come to the respondent and his contiguous lands by reason of this expenditure, and I am inclined to believe then, I run into the question that perhaps goes beyond the power that the Department of Agriculture have under the act. I have held, and it is by what I consider logical inference, and it is

not from the express language that the Government has a right to have a road out and in from its forest for the benefit of the general public, and for the use and purposes for which it was built, but when I go farther than that any say this becomes a public highway outside the National Forest, carrying with it all the elements of a federally owned or state owned or county owned public highway, that is what I must, if I permit the jury to offset benefits against damages. Then, I think I am enlarging the forest beyond its exterior boundary.

Mr. Keenan: I think not. We all know the [106] Polson Logging Company will use the road, no matter what it is called; that nobody living along the road, or having property along that road is going to be barred from going to and from his property, in and out of the fire season. We all know that is going to happen, no matter what name you call it. Call it public, private, or what you will, there is no question—there can be no question as a practical matter, but what land alongside a road, by whatever name you call that road, is benefited by the installation and maintenance of that road.

The Court: That isn't the question here, Mr. Keenan. The question is that you have here, did the Congress ever confer upon the Secretary of Agriculture, either by the original act setting up National Forests, or any or all of the subsequent acts, the power to come outside a forest and build a highway, independent of the identification of that highway, may have to a full and complete use of the forest.

Mr. Keenan: I assumed, Your Honor, that question has been determined before, at least for the purposes of this trial, before we started.

The Court: It was not determined on the issue of offsetting benefits against damages.

Mr. Keenan: I think that if it is determined [107] for one purpose, that the taking is proper, and we know as a practical matter that they will be used, and the declaration of taking says that it is for the public generally, for all lawful purposes, or some such language.

The Court: I think I shall decide here and now, so we won't wander too far afield, that there shall be no element of benefit to be offset against damages or compensation in this road, and I shall instruct the jury, of course, that no element of damages or loss, neither, shall be calculated upon any theory the respondents are going to be denied the same use that everybody else has to this highway—such uses as the Forest Service sees fit to make, and you may have an exception.

Mr. Keenan: It is my understanding of the Federal law on condemnation, quite apart from the State law, and I am speaking offhand, that wherever severance damage and benefit can be shown without exception don't depend on any statute. In the next question, is Polson Logging Company going to——

The Court: I think your law is correct, that is probably where I made the mistake in this case, by not requiring counsel on both sides to furnish points of authorities. I am rather inclined to be-

lieve [108] that your statement, Mr.—I am inclined—I feel certain on that, the ground in that, that if severance damages to the lands remaining are asserted, then you can offset benefits to the lands—that is, offer proof as to what benefits, to offset the damage, but whether they could ever reach the point where nominal damages are allowed, I don't think we will have so much trouble about that, but I am concerned about the other question, whether an item of damage would be the prospective tolls—whether it isn't so remote, and it gets into the field of speculation, but second and upon the more serious ground, whether any adjoining land owner to a National Forest can look forward to the day when the Government decides to put that product on the market and make a toll charge and add to his burden of the product to the extent of the toll, and use that as the basis for calculating compensation, for the Government seeks a way out and in, and if you intend to offer proof along that line as to what would be a fair reasonable toll, I want to hear from you and I am inclined to hold against you now, unless you convince me.

(Whereupon, argument by counsel.)

The Court: I shall hold now on the two issues passed upon, the one, that is benefits to the adjoining [109] land owner except as they involve asserted losses claimed by severance, cannot be shown; that the respondent on the other hand cannot show as an item of compensation any future potential or prospective tolls that he might have earned on this road by the haulage from the forest of growing

timber, or by any use that the general public might make to this way of ingress and egress to enter the forest, or go from the forest at any time.

Now, that should simplify your issue and bring you down to the issue of just what we will allow for compensation, and I in that respect, am not going to bind myself by this ruling now, but I am inclined to hold that a showing is competent on the part of the respondent that his damages go beyond the taking of the mere acreage involved in the land, and the damage to the remaining land, but they include therein likewise what the cash market value was to the improvements as taken on the day they they were taken, and of course, that does not foreclose the Government from showing that they had no value.

Mr. Keenan: As I understand it, then, it is simply a question of fair cash market value of the road.

The Court: Well, that includes these [110] elements—I am mentioning the elements so you can direct your testimony along those lines.

Mr. Keenan: I think I should at this time advise the Court and counsel that the Government's testimony will be less than the amount of the amount of the deposit—substantially less, and if so I am now informed, at least, and if any attempt is made either by questioning of one of the Government's witnesses or through statement of counsel or answer of respondents of land owners, witnesses to bring out the amount of deposits, the Government will move for a mistrial.

The Court: Well, I am not going to assume that counsel for the respondent will attempt to do that, nor would I assume that the counsel for the Government would do that which is improper, but with the ruling that the Court has now made, we ought to be able to expedite it, and I am again going to ask if there is any serious demand there be a view of the premises? It is an expensive procedure. It would delay the trial, and under weather conditions now it might create a very trying trip for a jury.

Mr. Keenan: Could we consider that until tomorrow noon, and when I make that suggestion I realize it is a question of checking on—it is a [111] question of checking on the road and the safety of it, and there are other things the Judge is going to inquire into before he will rule, and I do not know the answers to those questions now.

The Court: Well, I will leave it open for you. I think the motion was originally made by the respondent, wasn't it?

Mr. Metzger: Yes, it was, Your Honor.

The Court: Now, you are not pressing your motion that you formerly made?

Mr. Metzger: We are not pressing it.

Mr. Blair: At this time, Your Honor, because this may be in the nature of a pre-trial or——

The Court: I want to see what I can eliminate from this case, and narrow the issues down.

Mr. Blair: In order to protect the record, we except to your Honor's ruling that we are not entitled to show prospective earnings; that an owner not compelled to sell and a buyer not compelled to

buy, would consider those respective earnings in arriving at the fair cash market value.

The Court: I think it is perfectly proper to except, and your exceptions are allowed, and I presume the Government excepts to the ruling against accepting benefits. [112]

Mr. Keenan: Yes.

The Court: Exception allowed. And now, if there is nothing further, the Court will adjourn until 10:00 o'clock tomorrow morning.

(Whereupon, adjournment was taken until 10:00 o'clock A. M., November 13th, 1945.)

November 13, 1945, 10:00 o'clock a.m.

The court met pursuant to adjournment; all parties present.

The Court: Now, you may proceed.

Mr. Stella: Mr. Phillips, will you come forward, please?

EARL PHILLIPS,

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Stella:

Q. Mr. Phillips, handing you Petitioner's Exhibits 4 and 5, which you testified to yesterday, will you tell the Court and the jury what they show or what they are?

A. Well, these pictures are——

(Testimony of Earl Phillips.)

Q. Are they pictures of the road?

A. Pardon?

Q. Are they pictures of the road?

A. These are not the pictures of the road in question as I testified yesterday. [114]

Q. You were mistaken yesterday?

A. That is right.

Q. As to whether they were pictures of the road or not?

A. That is right, I was confused in locating these pictures because they were made on another grade that comes down through here—another road that comes down through this area. Not having seen this map before, I placed them on this map.

Q. The first time you saw the map was yesterday morning? A. That is right.

Q. The first time you have seen the pictures since you had them developed, till then?

A. Pardon me?

Q. Since you had these pictures made, too?

A. This is the first time I have seen them since.

Mr. Stella: I move the Court that they be withdrawn and the Court instruct the jury to disregard those Petitioner's Exhibits 4 and 5.

The Court: Any objection?

Mr. Metzger: We have no objection. They have been shown to the jury and I think the jury should —the most that can be done to cure this error is to tell the jury they have no bearing and it should be——

The Court: Well, the Court will give the ap-

(Testimony of Earl Phillips.)

propriate instruction. I just asked if you had any [115] objections. The exhibits will be withdrawn, and Exhibits 4 and 5 that were passed to the jury and exhibited to the jury yesterday are withdrawn, and for the reason that they do not have a bearing upon the immediate issues here involved, and you are instructed to disregard them as in any way being of evidentiary value.

Q. Handing you Petitioner's Exhibit No. 9, Mr. Phillips, I will ask you if you know what that is?

A. That is a picture of a portion of the M. & D. Logging road in Section 11.

Q. A portion of the road shown on this map taken by the United States?

A. That is right.

Q. Will you mark that with a red pencil, in the same manner which you have marked the other exhibits?

A. The picture was made from the junction of these two roads (indicating on map).

Q. Will you put the exhibit number on the map? (Witness does as directed.)

Q. When was that taken?

A. That was taken at the same time the others were. That was taken August, 1941.

Mr. Stella: That is all.

The Court: Any objection? [116]

Mr. Metzger: No objection.

Mr. Stella: And move it be admitted, Your Honor.

The Court: It will be admitted.

(Testimony of Earl Phillips.)

(Whereupon, picture referred to was then received in evidence and marked Petitioner's Exhibit No. 9.)

Mr. Stella: You may take the witness.

Mr. Metzger: No questions.

(Witness excused.) [117]

H. D. LA SALLE,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. La Salle?

A. H. D. La Salle.

Q. Where do you reside?

A. Aberdeen, Washington.

Q. How long have you resided in Aberdeen?

A. Nearly 22 years.

Q. And what business are you engaged in?

A. I am in the real estate business, insurance and appraisals.

Q. How long have you been engaged in that business?

A. Ever since I have been in Aberdeen, and some time before.

Q. And who have you appraised property for,

(Testimony of H. D. La Salle.)

Mr. La Salle? When I ask that question, I am referring to property in western Washington.

A. Oh, I have appraised for various different agencies, the Federal Housing Administration, the Home Owners Loan Corporation, and the Federal Public Housing Authority, and the Department of the Interior, United States Army, United States Navy, City of Aberdeen, and City of Hoquiam, State of Washington, various school districts, in the Grays Harbor County, and practically [118] all of the leading institutions on the Harbor at one time or another. I have appraised for both banks at Aberdeen and Hoquiam, and all of the Savings and Loans.

Q. Do you own any cut-over land of this forest land in Grays Harbor County?

A. I have 252 acres, between Aberdeen and Montesano on the highway.

Q. What kind of land?

A. Well, it is covered with second growth, at this time. It was cut-over many years ago.

Q. Now, are you familiar with the property taken in this case? A. I am.

Q. When did you first examine that property?

A. I first—July of this year that I made a close examination of it to become familiar with it.

Q. Have you checked the records to determine what land the Polson Logging Company owns, through which this right-of-way runs?

A. I have.

Q. And which contains a part of the land taken?

(Testimony of H. D. La Salle.)

A. I have.

Q. Will you step down to the Petitioner's Exhibit 2 on the board, and point out to the Court and the jury which lands they have through which that right-of-way runs, [119] or which contain any lands condemned in this case, and at the same time, you will name the section and the township and the range?

A. Well, it leaves—takes off from the United States Highway 101 in section thirty-five, twenty-one, ten and crosses right through the quarter between——

The Court: Speak a little louder, Mr. La Salle.

A. (Continuing): ——it passes through the quarter between the section twenty-six and thirty-six in twenty-one, then enters section twenty-five,—crosses section twenty-five, twenty-one, ten, and goes into section thirty in twenty-one, nine, and crosses at the northwest quarter of section twenty-nine, twenty-one, nine, and it crosses section twenty. In fact that is in section twenty, is where the road—two portions of the road forks, and the one portion of the road that goes up to Donkey Creek crosses the quarter of section twenty-one and the next is a school section. That is not a Polson land. It crosses the southwest quarter of section nine, it crosses the northwest corner of section ten, and along the south of the border of section three and then enters section eleven, all in section twenty-one, nine, and this other branch crosses section seventeen, and eight, and there is another portion of the road over this

(Testimony of H. D. La Salle.)

section one, and it touches the corner of section twelve. [120] Those are in twenty-one, ten. The two tracts that are wider than the ordinary right-of-way, identified as tracts 2 and 3, are in—tract 2 is in section ten, and tract 3 is in section nine, twenty-one, nine.

Q. Now, as to these sections, sections which you have mentioned, is there any evidence they—that you have mentioned, other than section three and four in township twenty-one, nine, which the Polson Logging Company, so far as you know, does not own the whole section?

A. I will have to refer to my record for that.

Section twenty-one, nine, Polson Logging Company only owns the west half of the northwest quarter, and that is the portion that is cut by this right-of-way.

Q. I beg your pardon.

A. I say, in section twenty-one, twenty-one, nine, the Polson Logging Company only owns the west half of the northwest quarter of the section, and that is the portion which the right-of-way passes through.

The Court: Well, will you step down to that map and indicate so the jury and Court can have a better understanding of what part you refer to.

A. The west half of the northwest quarter would be that shape on the map, and that is owned by the Polson Logging Company. The balance of that section is in other ownership. [121]

Mr. Keenan: Will you take a red pencil and show

(Testimony of H. D. La Salle.)

a little hatching—have you got one, which of those are owned by the Polson Logging Company, through which this right-of-way runs?

The Witness: You mean on the whole map?

Mr. Keenan: Yes.

A. Well, they own all of the—how would you like to have that indicated on the map?

Q. Beg pardon?

A. How would you like to have that indicated on the map?

Q. I would take that and hatch it very broadly and cut down and save as much time as possible.

A. All right.

(Witness does as directed.)

Q. Do you know who owns section sixteen in township twenty-one, nine?

A. Well, that is a school section. It belongs to the State of Washington.

Q. Do you know whether or not the Polson Logging Company has the right-of-way across that section sixteen? A. They have had.

Q. Do you know whether they have one now—I mean speaking as of October 22nd, 1943?

A. They did have.

Q. Up to the time when the case was filed? [122]

A. Yes, they did have a permit to cross it.

Q. Do you know when that license or permit would have expired?

A. No, I am not sure. I did look it up, but I have forgotten the date.

Q. Now, will you show us whatever lands abut-

(Testimony of H. D. La Salle.)

ting, adjoining or touching the Polson Logging Company lands that you designated on that map, what other lands are owned by the Polson Logging Company,—talking only, however, of additional lands that adjoin, or abutt on these sections of which you have indicated.

A. Well, I probably can indicate them by showing the other way.

(Witness marking on map.)

Q. Will you, for the sake of the record indicate which sections or portions of sections you are now marking, Mr. La Salle?

A. Well, I marked section twenty-six in twenty-one, ten. This is the north half, and the north half of the south half of section thirty-one, twenty-one, nine.

Mr. Metzger: What section did you say, sir?

The Witness: Thirty-one. This is the north half of the northwest quarter of the southwest quarter, of northwest quarter, and the northwest quarter of the southwest quarter, section thirty-two, twenty-one, nine. [123]

This is all of section nineteen, twenty-one nine.

All of section eighteen, and all of section seven.

The north half of section fifteen, and the north half of the northwest quarter of section fourteen, and I want to correct myself in speaking—in describing the section through which the road passed. The Polson Logging Company do not own this north half of the southwest quarter of section eleven.

They also own the southwest corner of the north-

(Testimony of H. D. La Salle.)

east quarter, the west half of the southeast quarter, and the northeast quarter of the southwest quarter of section four, twenty-one, nine.

I believe that is all.

Q. Do you know, Mr. La Salle, which if any of these lands you have descried, are timbered?

A. The only portion of the lands that are timbered is that portion which—section twenty-one, nine.

Q. Will you indicate that?

A. These four forties, in section four have not been logged.

Q. And when you say timber, do you mean have not been logged? A. That is right.

Q. Did you take any photographs of lands involved here? [124] A. I did.

Q. When did you take those photographs? Will you hand them to the Bailiff, please?

A. September, of this year.

Q. Mr. La Salle, have you formed any opinion as to whether or not there has been any severance damage to the lands of the Polson Logging Company which you have indicated on that map, by virtue of the taking of the lands in this case by the Federal Government?

A. I did. I naturally took that into consideration, because that is always an element in an appraisal.

Q. What did you determine?

A. I determined that there was no severance

(Testimony of H. D. La Salle.)

damage to the abutting property of the Polson Logging Company.

Q. Now, is any of that land shown on that map, inhabited? A. No, sir.

Q. Are there any houses built on any of the lands, shown on that map?

A. No improvements of that type whatsoever.

Q. Will you describe that lands generally which is shown on the map and which you have hatched in?

A. Well, it is rolling, too, quite broken in places, but generally rolling country. It has been cut over some years back, most of it fully stocked with new growth; [125] some of it practically no re-seeding. Some of it has a fair start of re-seeding.

There is some deep ravines and gullies, of course, is cut by the west fork of the Humptulips, and these various creeks—just a type of a logged over area.

Q. You have in your hand, Mr. La Salle, Petitioner's Exhibit number 10 for identification. That is the lowest number on the back of those cards, is it not? A. Yes, that is right.

Q. Will you explain what that is?

A. It is a picture that I took this fall, standing on the road, the right-of-way in question, and in—pardon, I will show you on the map where it is approximately this location in Section thirty, and facing almost directly south when I took that picture.

Mr. Metzger: Will you please define that location a little more accurately, than pointing at the map and saying "this location."

(Testimony of H. D. La Salle.)

The Witness: Well, it was after we had crossed the Eagles Creek and O'Brien Creek bridges and fill, and there is quite a long straight area in the road there that is fairly level, and it was at that point, that we stopped and I took this picture, before we got to the fork in section twenty. [126]

Q. What Section was that taken in?

A. Taken in thirty.

The Court: Proceed.

Mr. Keenan: I handed counsel all of the pictures, Your Honor. I should have done it before.

The Court: Well, you have only identified one.

Q. What is Petitioner's Exhibit Number 11 for identification?

A. That is a picture that I took right at the fork of the roads in Section twenty, facing practically east, and I was standing right in the intersection.

The Court: I am wondering if this evidence would not be of greater value if it were identified some way or other on the map as it goes along.

Q. Can you indicate on the map where you took the pictures?

The Court: Six, eleven, or some other identification.

Mr. Keenan: As the Court suggests, I would use the number ten for the first one, and eleven for the next one.

(The Witness marks on map.)

The Court: Now, as you identify them, hand

(Testimony of H. D. La Salle.)

them to the Bailiff, and the Bailiff will hand them to Mr. Metzger.

Q. Will you tell us what Petitioner's Exhibit Number 11 is? [127]

A. Number 11 was taken standing right in the intersection of this road.

Q. You have indicated with eleven on that?

A. I have.

Q. Petitioner's Exhibit Number 12?

A. Number 12, I turned around in the same position and took a picture to the northwest.

Q. Have you indicated that on the map?

A. I have.

Q. What is Petitioner's Exhibit Number 13?

A. Number 13 was taken in Section eleven, facing across to the south.

Q. And Petitioner's Exhibit 14?

A. Number 14, I was near the end of the road, facing exactly south. We set the compass on it, and the background on that picture shows some reforesting which was in this eighty.

Q. And where are you pointing?

A. That is in the south.

Q. Will you indicate on the map where you were on Exhibit 14? A. Yes, sir.

Q. And 15, Mr. La Salle?

A. Number 15, I stood in the same position and faced west.

Q. And 16? [128]

A. Number 16 was taken in tract 3, in section

(Testimony of H. D. La Salle.)

nine. I stood on the right-of-way and faced in a southeasterly direction.

Q. 17?

A. 17 is the picture of the gravel bank going down to the river. The road is cut right along side of the bank and I just took it to indicate, because this area was being taken for gravel purposes, to indicate what type of gravel there is there. It was in the—approximately this location. (Indicating.)

Q. For the record, where were you looking.

A. In the west part of section nine.

Mr. Keenan: Is that all of them?

The Witness: That is all.

Q. And were all of these pictures taken on the same day? A. They were.

Q. They were all taken by you?

A. They were.

Q. And all of them, either depict—all of them were taken from the road?

A. I was standing in the area in question when every one of the pictures was taken.

Mr. Keenan: At this time the Government offers in evidence Petitioner's Exhibit numbered 10 to 17 for identification, inclusive. [129]

The Court: Any objection?

Mr. Metzger: Just a moment, Your Honor, please.

Where did you say picture Exhibit for identication 13 was taken? I don't see it marked here—Oh, I see it now.

The Witness: There. (Indicating.)

(Testimony of H. D. La Salle.)

Mr. Metzger: I see. No objection.

The Court: They will be admitted in evidence.

(Whereupon, pictures referred to was then received in evidence and marked Petitioner's Exhibit Nos. 10-17, incl.)

Q. What in your opinion is the highest and the best use of the land being condemned here, Mr. LaSalle?

A. Growth of forest products, re-foresting, and a trail for fire prevention.

Q. Are you generally familiar with the values of cut over land in western Washington?

A. I am.

Q. And how did you acquire that familiarity?

A. By my own transactions and searching the records for market data, sales of comparable properties.

Q. What have you done, specifically to prepare yourself to testify to values in this case?

A. I have checked the records of Grays Harbor County [130] for the sales—of transfers of property in this area immediately around the take, all of section—all of township twenty-one, nine, a portion of section—or township twenty-one ten, and some surrounding areas.

Q. Can you tell us—I'm not sure whether I asked this question before or not. Can you tell us what portion of the Polson Logging Company lands shown on that map are timbered? Did I ask that question? A. You did.

Mr. Keenan: All right.

(Testimony of H. D. La Salle.)

Q. Well, have you formed an opinion as to the fair cash market value of all the lands condemned here in—in the condition it was when the Government took it in this case, and speaking as of a valuation date of October 22nd, 1943?

A. I have.

Q. And what in your opinion, is the fair cash market value of the lands taken in this case on that date?

Mr. Blair: To that we object, Your Honor, on the ground that the witness has not shown himself qualified to testify. I would like to interrogate the witness briefly as to his qualifications.

The Court: The Court is satisfied that he is.

Mr. Blair: Your Honor, please, the evidence [131] in this case now shows that this property was not logged off land at the time of the taking. It was a truck logging road, being used as such at the time the Government took it, and that fact is conceded here—brought out by the testimony of the Government's own witnesses, and to permit a man to testify to its valuation as logged-off land, when it was a truck logging use, of course, is improper.

The Court: If the question does not imply that it should, or you should be permitted——

Mr. Blair: I think the question clearly did not.

(Question read.)

The Court: I think that implies the conditions in which this entire right-of-way was, as taken.

Mr. Blair: I did not question it, and the witness in attempting to show his qualifications, said that

(Testimony of H. D. La Salle.)

he had made an investigation as to what logged-off land was worth. Clearly this was not logged-off land. It was a logging road.

The Court: He may answer, and you will have an opportunity to cross examine.

Mr. Blair: An exception, Your Honor.

A. I consider on that date the land was worth a dollar an [132] acre, $273.96.

Mr. Keenan: You may cross examine.

Cross Examination

By Mr. Blair:

Q. Mr. La Salle, in arriving at that figure of a dollar an acre, what did you taken into consideration?

A. As I said, I have checked the record for transactions on all the land in that vicinity, and the sales during that period did not amount to a dollar an acre.

Q. Mr. La Salle, did you ever own a logging road? A. I never did.

Q. Did you ever build a logging road?

A. I never did.

Q. Have you any conception of what it costs to build logging roads?

A. Not close enough so that I would want to give you a figure on it.

Q. Did you ever buy a logging road?

A. I never did.

Q. Did you ever sell a logging road?

A. I don't think I ever did.

(Testimony of H. D. La Salle.)

Q. In arriving——

A. I have bought right-of-ways.

Q. In arriving at the opinion you have expressed here, [133] of a dollar an acre, you did not take into consideration at all the fact there was a logging road on this land, did you?

A. Yes, sir.

Q. What consideration did you give that fact?

A. I have found out from my investigation, although I was only over it, pretty well the condition the road was in at the time of the taking. I have been over the road in its present condition. In my opinion the Polson Company has a lot better road than they ever would have under—their ownership, and they are certainly exercising proprietorship over it, they tried to kick me off of it.

Mr. Blair: I move the last remark be stricken.

The Court: Stricken.

Q. So, it is your conception that the Polson Logging Company has now a better road than it had had? A. Yes.

Q. However, the Polson Logging Company does not have any road any more, does it?

A. They certainly have the use of a road.

Q. They have the use of a road?

A. Yes, sir.

Q. It is because they have now the use of that road, you place this figure of $1.50 an acre in?

A. That is right.

Q. In your testimony here?

A. Yes, I figured they have not been harmed a

(Testimony of H. D. La Salle.)

particle by the Government's taking. They have a finer road than in 1940, which they are using.

Mr. Blair: At this time we move to strike the entire testimony of the witness as to market value because he has not placed his market value on the property that has been taken by the Government, but has attempted to assume that that property has not been taken.

The Court: The motion will have to be denied and an exception allowed.

Mr. Blair: Exception.

Q. Mr. La Salle, generally speaking what is north of it, and the water basin or watershed through which the road that is under contemplation travels—what is to the north of that?

A. National Forest.

Q. There are private timber ownerships in the National Forest, of course? A. Some.

Q. And that this is an unlogged forest?

A. Yes, sir.

Q. A mature forest? A. Yes, sir. [135]

Mr. Keenan: If the Court please, this is objected to, what land is forested in the north. That is not the property of the Polson Logging Company, or not abutting or adjacent to any property taken here, and is not properly a question of inquiry in this case.

The Court: Objection will be overruled, and an exception allowed.

Q. Do you know what quantity of timber there is in that watershed, and that will be logically and

(Testimony of H. D. La Salle.)

in due course probably removed over the road that is being condemned here?

A. Oh, I have heard it estimated, but there are other witnesses better qualified to answer, because I am not in the Forestry Service.

Q. Speaking generally now of the watershed area to south, south of the forest—the area that is contiguous to, and served by the road that is under condemnation here. You say that area generally is a logged-over area? A. That is right.

Q. And it has been logged-over from 10 to 30 years?

A. Well, some of it may have been logged as long ago as 30 years. I doubt it. Some of it has been logged in less than 10 years, some of it that has no re-seeding yet at all. Maybe that is because of burns.

Q. But, the substantial part of it was logged 10 to 30 years ago?

A. Well, there is a cutting record in the Court to tell exactly. I wouldn't want to testify to exactly the cutting dates.

Q. That area generally is known as the Polson Tree Farm?

A. I think they consider it.

Q. Do you know how that tree farm compares with the other tree farms in the Douglas Fir region?

A. Oh, I have been in the Schaffer Tree Farm, and I have been in the Clemons Tree Farm, and I think it is comparable?

Q. As a matter of fact, isn't that considered by

(Testimony of H. D. La Salle.)

forestry men the equal of any tree farm in the Douglas Fir area?

A. The forestry men would have to answer that.

Q. You don't know about that?

A. I don't know about that.

Q. You have never been in the logging business?

A. No.

Q. You are not a forester? A. I am not.

Q. People are buying lands that have been logged-over upon which there is regrowth timber, for the purpose of managing and protecting that forest, and ultimately harvesting it, aren't they?

A. The last three or four years there has been quite a little activity in picking up lands that previously went to the county for taxes, for tree farm purposes. I don't know, but anyway, they have been buying it up.

Q. And holding them with the expectation that they will ultimately harvest that crop and make a profit? A. I grant you somebody did.

Q. About when do you think the first harvest will be taken of this Polson Tree area?

A. Outside of the Cascara bark, I think it will be very long——

Q. You think it will be a very long time?

A. Yes.

Q. That is one of the assumptions you had in mind when you fixed the market value?

A. A dollar an acre is the market value. In fact, the County still owns some in there.

Q. When you valued this, you gave no consid-

(Testimony of H. D. La Salle.)

eration at all to the cost of the road that the Polson Logging Company had in there?

A. No, the road that they had in there prior to the M. D. coming and fixing it up so they could take out that timber, it was an abandoned grade. It is a matter of reforesting like anything else, but of course, the M. D. came in and fixed it up so they were able to take some timber out of it. [138]

Q. Now, was the M. and D. taking timber out of the National Forest?

A. They took M. and D. and took some of the National Forest.

Q. Another logging operator by the name of Johnson took timber out of the National Forest and used that road to remove it?

A. I think he used the west branch.

Q. And paid the Polson Logging Company a fee for the use of the road? A. I don't know.

Q. Anyway, it was used by loggers to remove logs previous to the time the Government took it.

A. I know it was previous to that, I don't know as to the time.

Q. When you put the value on this, you ignored the fact that this was a logging road?

A. I did not give any value to it as a road.

Q. You did not give it any consideration, as to that element of value? A. That is right.

Redirect Examination

By Mr. Keenan:

Q. How many logging roads there in Gray Harbor County?

(Testimony of H. D. La Salle.)

Mr. Blair: Objected as immaterial. [139]

The Court: Objection sustained. The witness has not shown himself qualified to answer that. The question is not pertinent here.

Q. Have you sold land in Grays Harbor County that had logging roads on them?

Mr. Blair: We object to that as immaterial, Your Honor.

The Court: Oh, I think he may answer.

Q. What other lands and what logging roads maybe——

The Court: He is confined in this same general region.

A. I have bought lands in tax resale that had abandoned railroad grades on them, if that is what you mean.

Mr. Keenan: I think that is all, Mr. La Salle, thank you.

(Witness excused.) [140]

LEONARD D. BLODGETT,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Blodgett?

A. Leonard D. Blodgett.

Q. Where do you live? A. Olympia.

Q. And by whom are you employed?

(Testimony of Leonard D. Blodgett.)

A. By the United States Forest Service.

Q. And in what capacity?

A. I am—my title is Forester. I am with the Supervisor's staff.

Q. And did you make a cruise of the Polson timber in Section 4, Township 21, North Range 9 West?

A. I did.

Q. And when was that cruise made?

A. It was made about the middle of October.

Q. What year? A. This year, 1945.

Q. Now, will you tell us—give us a brief resume of your experience in surveying in the timber business, at the time you first went out in a survey party, or anything [141] to——

A. Well, I worked for the Forest Service for twenty-eight or nine years.

Q. Well, will you speak up so the jury can hear you?

A. I worked in the Forest Service for twenty-eight or nine years, and previous to that I worked for the Department of Interior on a surveying party—on several surveying parties, for about five years, and during the time that I have been in the Forest Service——

Mr. Keenan: It is very hard to hear you.

A. (Continuing): During the time I have been in the Forest Service I have had considerable experience in cruising timber. I have made a good many cruises, and mapped timber.

The Court: Speak louder now, so we can all hear you. I am having difficulty.

(Testimony of Leonard D. Blodgett.)

Mr. Keenan: I did not hear the last answer.

The Witness: I say, that during the time that I have been with the Forest Service, I have had experience in cruising timber and have cruised a great many tracts during that time.

Q. Well, during this period, which branch of the Forest Service have you been in most of the time?

A. In timber management.

Q. What does the timber management branch of the Forest [142] Service do?

A. That sells the timber, and plants the areas. In other words, administers the selling and everything to do with the timber stands and sales.

Q. And in order to handle these sales of timber, is it necessary for the Forest Service to have a cruise?

A. Yes, that is right. To sell them, we have to.

Q. And what if any check is made on those cruises?

A. Well, the timber is cut. We can check it against the actual scale.

Q. Well, now, what do you mean, the actual scale?

A. Well, when the timber is cut the logs are paid for on a scale. They are scaled and paid for on the basis of the actual scale volume.

Q. Now, what kind of a cruise did you make as to this section of Polson timber in Section 4, Township 21, 9 West? I mean, in percentage?

A. Ten per cent.

Q. Ten per cent, and what is your estimate as

(Testimony of Leonard D. Blodgett.)

to the amount of timber owned by the Polson Logging Company in the three forties I think it is, is that right, which they own in Section 4?

A. Four forties.

Q. Four forties, in Section 4, Township 21, North Range 9 West? [143]

A. I estimated 2,700,000.

Q. 2,700,000 what? A. Of all species.

Q. Board feet? A. Board feet, yes.

Q. And will you give us the break-down of that figure 2,700,000 by species?

A. I have it here. That was 1,116,000 hemlock, 61,000 cedar, 1,496,000 spruce, and 24,000 Douglas fir. Total,—exact total is 2,701,650.

Mr. Keenan: You may cross-examine.

Mr. Metzger: No cross-examination.

Mr. Keenan: That is all, Mr. Blodgett, thank you.

(Witness excused.)

The Court: It is now time for the morning intermission, so we will take a recess for fifteen minutes, gentlemen of the jury.

(Recess.) [144]

W. H. ABEL,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Your full name is W. H. Abel?

(Testimony of W. H. Abel.)

A. Yes.

Q. And where do you live, Mr. Abel?

A. At Montesano.

Q. And you practice law? A. Yes.

Q. Do you? A. Yes.

Q. At Montesano? A. Yes.

Q. How long have you practiced law at Montesano? A. Fifty-two years.

Q. And Montesano is the county seat of Gray Harbor County? A. It is.

Q. During the period that you have practiced law at Montesano, have you had among your clients loggers and mill men? A. Quite a number.

Q. What logging companies have you represented?

A. Polson Logging Company, Simpson Logging Company, Schafer Bros. Logging Company, and Weyerhaeuser Timber Company, and a lot of others, Anderson-Middleton Company, and a lot of others.

Q. Have you bought and sold timber land on your own account? A. I have.

Q. And over what period of time?

A. Approximately forty-five years.

Q. And have you bought and sold timber land for the account of others? A. I have.

Q. And have you bought and sold cut-over land?

A. I have.

Q. For your own accounts?

A. For my own account, yes.

Q. Do you know the condition of this road, and the land abutting on the road as shown by the Pol-

(Testimony of W. H. Abel.)

son Logging Company at the time the Government took over the road?

A. That is on February 2nd, 1942?

Mr. Metzger: Object, if Your Honor please, as immaterial and irrelevant. We are concerned with the date as of October 22nd, 1943.

The Court: Well, it is not in dispute the [146] Government took an easement in February, and a fee in October.

Mr. Metzger: Yes, we dispute that. Your Honor has held that and set it aside, and that record stands. That taking has been set aside by this Court, and has never been modified.

The Court: The legal phases of it—the actual facts though are what we are concerned with here, and I shall overrule the objection and allow you an exception.

Mr. Metzger: There is no proof the Government took it over on that date, and they did not do anything with the road, and there is proof before this Court that they did nothing with the road until after November, 1943.

The Court: The objection will be overruled and exception allowed.

Mr. Metzger: Allow us an exception.

Mr. Keenan: You may answer the question.

A. Just what is the question?

Mr. Metzger: Object to that as assuming nothing in evidence. There is no evidence the Government took it at that time.

The Court: I am going to sustain the objection

(Testimony of W. H. Abel.)

in the form the question was asked. If you want to [147] ask the question as to the particular time—the question is vague in the form you asked it.

Q. Do you know the condition of this road in February of 1942? A. I do.

Q. Will you tell us what condition this road was in, in the month of February, 1942?

Mr. Metzger: Object as irrelevant.

The Court: Overruled.

Mr. Metzger: We are concerned with the value as of the time of taking.

The Court: Objection will be overruled and exception allowed, Mr. Metzger.

Mr. Metzger: I cite the decision of the Circuit Court of Appeals for the 9th Circuit.

The Court: The Court has ruled Mr. Metzger.

A. On February 5th, M. & D. Timber Company —that company consists of myself and my son, Clyde Abel, under authority of the Government and under a Government permit, entered into possession of the road and put it in condition.

Mr. Blair: Object.

A. (Continuing) On that date.

The Court: Proceed.

A. (Continuing) We started—— [148]

Mr. Blair: Move that the answer be stricken as not responsive to the question.

The Court: Motion will be denied and exception allowed.

A. The road had been unused over the winter. It had been previously used by M. & D. Timber

(Testimony of W. H. Abel.)

Company, and that company had a private condemnation suit to condemn an easement over it.

The Court: I don't think—I doubt whether these facts are material, unless they go to the credibility of the witness.

Q. Can you tell us exactly what shape it was in?

A. It was in——

Q. In February?

A. It was not in good shape. It was not usable without being placed in condition. Our company placed it in condition for use, and after certain proceedings in April, whereby we bought timber from Polson Logging Company at the southeast of 3——

Q. What year are you speaking of?

A. I am speaking of '42—1942, M. & D. Timber Company used the road, maintained it, put it in usable condition and kept it so at its sole expense, until the first take order was vacated. During that time we took out a lot. The country was at war and we took out [149] timber for the Forest Service. We also took out our timber which we had owned otherwise. We took the timber from the south half of the northwest quarter and the north half of the southwest quarter of Section 12, which we owned. We took off the timber from the south half of the southwest quarter of Section 12, and the northwest quarter of Section 13 in this township and used the road continuously from April 8th until we were notified that the Government's first take order was —had been vacated, and we stopped, and we have

(Testimony of W. H. Abel.)

never used it since for the hauling of logs. All of that operation was under Government permit, and maintenance charge which we paid the Government. The Government maintained a bar at the road. There was a complete taking early in February. The road was posted as a Government road. We submitted to regulations by the Government. We did what the Government directed us to in putting these so-called unsafe bridges——

Mr. Metzger: Your Honor, this is wholly immaterial, and move to strike this as not responsive.

The Court: Yes, it is not responsive.

Mr. Metzger: Not binding upon the respondent in this case in any event.

Q. Mr. Polson—beg your pardon, Mr. Abel, when did you [150] first start using this road?

A. In either April or May, of 1939.

Q. And was that arrangement made with—was the arrangement made with Polson whereby you could use it? I just like to know whether there was such an arrangement?

A. Yes, but the arrangement was with A. M. Abel, who was my brother, who had timber which we purchased. That was back in '39.

Q. And when you took over, what condition was the road in at that time?

A. It was not travelable at all. One could go over it by foot, no other way.

Q. Was it then——

Mr. Blair: You are talking about 1939?

Mr. Keenan: That is right.

(Testimony of W. H. Abel.)

Mr. Blair: We object.

The Court: Objection will be overruled.

Q. Was it then a railroad or truck road?

A. It was neither. There was an unused grade. The bridges were not decked.

The Court: I think he should limit himself to particular roads here.

Mr. Keenan: I am talking about the road, Your Honor, and Mr. Abel, that is being taken here in this case. [151]

The Court: Very well.

A. (Continuing) May I delineate on the map the portion that I am talking about?

Mr. Keenan: That is right, please.

A. Commencing at the intersection with the Olympic Highway, the line that is marked "A" to the end of the green line there.

Q. Was the steel there at that time, Mr. Abel?

A. There was not.

Q. The rails had been picked, then?

A. Yes.

Q. And the road was subsequently—the road bed was subsequently converted to a truck road?

A. M. & D. Timber Company did that prior to the Government taking over, prior to February 2nd, 1942.

Q. Now, what is meant by a tree farm, Mr. Abel?

A. Well, that expression——

Mr. Metzger: Object, if Your Honor please. The witness has not shown himself qualified.

A. Well, as applied——

(Testimony of W. H. Abel.)

The Court: I think he has, sufficiently. You may answer the question.

A. As applied to this case, I never heard it until this morning, the Polson Tree Farm.

Q. What is generally meant by a tree farm?

A. It is a term that has come in use whereby a lot of tax title lands have been sold as one block, and the buyer uses it to let trees grow on it. There is several such in Grays Harbor County. They are not farms—at least, are not planted, but they are just permitted to let nature take its course.

Q. There are some instances where trees are planted?

A. Yes, sir, on the Clemons, there was some slight planting.

Q. Are you familiar with the prices paid for cut-over land in Grays Harbor County?

A. I am.

Q. For a period of recent years?

A. Over a period of quite a number of years.

Q. And how did you acquire that familiarity?

A. By buying, principally.

Q. And do you own any land at the present time in Township 21, North Range 9 West?

A. With my son. We own quite a lot.

Q. And some land in adjoining townships?

A. Yes, in 29, in 20, 11, and 19, 9, and 20, 11 and in several other townships in the general territory.

Q. Have you ever bought or sold a truck road?

A. Yes, sir.

Q. Beg your pardon? A. I have. [153]

(Testimony of W. H. Abel.)

Q. Have you ever bought or sold a logging railroad? A. I have.

Q. Generally speaking, how do they appraise a truck road?

A. It depends upon whether the owner of the road has any timber of his own, or that he can control, come over the road. There are hundreds—indeed hundreds of miles of roads in Grays Harbor County where the owner has ceased to use them—has no more timber to come out, and then the road beds are just land—just land.

Q. And how do they appraise logging railroads?

A. Well——

Q. For sale purposes.

A. Well, that depends.

Q. I am talking about railroads at this point.

A. Well, that depends upon whether——

Mr. Metzger: I object as improper, how they appraise—asking how somebody else does it is incompetent.

The Court: I think it is.

Q. Generally speaking, Mr. Abel, what is the basis upon which the price—the price at which a logging railroad is sold, is arrived at?

Mr. Metzger: Object again, for the same reason.

Q. In southwestern Washington? [154]

Mr. Metzger: This is asking for hearsay testimony as to what other people do, with which we cannot cross-examine upon.

The Court: Oh, I think I will let him answer. The jury will understand that all of these are just

(Testimony of W. H. Abel.)

merely opinions and not facts, and the testimony of them in an eminent domain case is one of opinion. The question of what weight or value to be given to it is dependent upon the qualifications of the person giving the opinion.

Mr. Metzger: In this particular instance, the witness is not being asked his opinion. He is being asked what other people generally——

The Court: If the question is intended to be in the form which you indicate, I shall sustain the objection.

Mr. Metzger: That is the question.

Q. Mr. Abel, how many sales do you know of, of either a logging railroad or a logging truck road in Grays Harbor County, or any county adjoining Grays Harbor County?

A. I have had during the past thirty or forty years, I have either sat with the buyer or the seller on quite a number.

Q. How many would you estimate?

A. Well, I never added them up. I could rattle them off [155] and give you the name.

Q. All right, will you name them, please?

Mr. Metzger: Object, if Your Honor please.

A. I can give you the names.

Mr. Metzger: As immaterial and irrelevant. Thirty years is too remote in time, Your Honor will take judicial notice that truck logging thirty years ago was unknown. There were not any.

The Court: The objection will be overruled, and of course I do not expect him to go into any elaborate

(Testimony of W. H. Abel.)

details, but the question goes to his qualifications to answer the ultimate question, I assume.

Mr. Metzger: Allow us an exception.

The Witness: State the question.

Q. Which is referred to truck roads. I refer to the sales of either logging railroad, or a logging truck road, where you are familiar with the details, either through representing the buyer or the seller or any other capacity.

A. There are so many varying factors. Trucking has only come into being in the late years, and very often old railroad grades have been converted into trucking roads. The first and perhaps most typical that I would give, would be the Donovan Logging Company, commencing at tidewater on the Wishkaw River, extending north to [156] approximately Section 22, in 21, 8, the township to the east of this township. I had had much familiarity with that road, and the previous ownership of that road, and the rights of way for a period of a good many years, when that company and its railroad was headed right into the National Forest. That is, it could have been extended right into the National Forest. Lacking timber, it quit. The rails were taken up and sold as rails. The railroad grade with bridges and trestles are still there, and are of no value whatever, because there is no timber to come over the road—no timber controlled by the owner of the grade. I was employed, shall I say, to try to sell that as an existing, operating—as an existing unit, capable of operation to serve the Grays Harbor

(Testimony of W. H. Abel.)

market from the timber in this identical National Forest six miles to the east. Being unable to get a supply of timber, I couldn't sell the road, and it was junked.

Q. What other sales have——

A. To the west of this road—to the west of this township, possibly six or nine miles west, I represented for many years the Copallis Lumber Company.

Mr. Blair: Now, if the Court please, this has gone far enough.

The Court: I think I shall sustain the [157] objection to the question.

Q. Just tell us briefly, Mr. Abel, the sales that you are familiar with of logging railroads or logging truck roads, just where the operation was located, the name of the company that maintained the operation. I don't want any of the details of the sales themselves at this time.

A. Well, I am not sure that I can just without amplying, telling you I can give you the factual setup, of the Mason County Logging Company, Vance Lumber Company, and the railroad was valued with the steel in place, although that was an operating company——

Mr. Blair: If the Court please, we object as not responsive to the question. The question is what——

The Court: All these questions I assume go to the qualification of this witness to answer the ultimate question that you are going to ask him as to his

(Testimony of W. H. Abel.)

opinion as to the value of the property here in question?

A. I sold the Lytel Myrtle Logging Company for the value of the steel upon it some years ago.

Mr. Blair: The witness is a lawyer and he knows the objection. We ask that the answer be stricken.

The Court: The answer will be stricken.

Q. As I understand the Court, Mr. Abel, you are only to testify at this time to the sales of logging railroads or truck roads that you are familiar with, and simply as that has a bearing on your qualifications to testify to the value here.

A. I know of several sales of land with grades upon them that are unused,—no timber, by the owner of the grade, being over it.

Q. Now, have you purchased any property in the vicinity, of a similar character to the property involved here in recent years? A. I have.

Q. And where is that property?

A. I purchased the south half of the southeast half of Section 11, the north half of the northeast of Section 14, from Washington-California Company, some three years ago, about the time that this matter came up.

Q. And you say you are talking about Sections 11 and 12 in this township?

A. No, Section—that is Sections 11 and 14 in this township. That makes 160 acres in square form.

Q. And what was the date of that purchase?

A. I have the deed in my portfolio. I haven't it, but it was about three years ago. [159]

(Testimony of W. H. Abel.)

Q. It was three years ago?

A. Yes, two or three years ago. That is the land lying alongside some of this land.

Q. And was that a voluntary sale?

A. Yes.

Q. And the part of the seller? A. Yes.

Q. There was no compulson on the seller's part to sell? A. No.

Q. What was the consideration that was paid?

A. It was $100.00 for the 160 acres, plus the taxes against the property, which made it, I think, about $165.00 for the 160 acres. That is perhaps the nearest.

The next is the south half of Section 13, except the southwest of the southwest, and that was two or three sales, and I purchased that at somewhat less.

Q. What is the date?

A. Shortly—a year or two before some of the——

Q. A year or two before the first sale that you mentioned?

A. Yes, I have it. I shall be able after lunch to give you the date, if you desire. That is also in the same township.

Q. And who were the sellers there?

A. The County. [160]

Q. What type of sale was it?

A. I did not hear that.

Q. What type of sale was it, these county owned lands? A. Yes, public auction sale.

Q. And the title was in the County?

(Testimony of W. H. Abel.)

A. Yes.

Q. What was the consideration there?

A. Well, I think 160 of that was $125.00.

Mr. Metzger: I think that is improper. That was a County sale after a foreclosure for taxes.

A. A resale.

Mr. Metzger: I object to that as incompetent.

The Court: He may answer.

Mr. Keenan: As I understand the witness, the land was owned by the County and was sold at public auction, and I don't think that the County stands in any position——

The Court: The Court has overruled the objection, let's proceed. Exception allowed.

A. The south side of the township east of Humptulips.

Q. Mr. Abel, the question which I asked and which was objected to, was, what was the consideration that you paid?

A. I have not in memory the exact figures. I can supply them after lunch, but for 160 acres I am sure it was [161] $125.00, and the three forties, varying prices. I can't remember. I would say under a dollar an acre.

Q. What other sales? Would it be easier for you to testify to these sales after lunch?

A. Not a bit.

Q. What other sales did you participate in?

A. Within about a year or so, in the township to the south through John Escalie, I bought from W. E. Boge of Seattle, and the heirs of his nephew's estate,

(Testimony of W. H. Abel.)

some 1600 acres at a dollar an acre, plus the taxes. The taxes ran up another dollar. That was in——

Q. I didn't understand how high the taxes ran.

A. I think that was perhaps nearly another dollar in that instance, but that was a well blocked tract of some 1600 acres, and my deal with Mr. Escalie amounted to this: He made the purchase——

Mr. Metzger: Object as immaterial and irrelevant.

The Court: Yes, I sustain the objection.

A. Over to the east a ways, about a month ago, I bought——

Mr. Metzger: I object, if Your Honor please, as not properly defined, "over to the east a ways".

A. I will. The property was the west half of Section 12, and all of Section 18, of 19, 7. I purchased that for $500.00, some 900 acres—$500.00 plus the taxes. [162]

Mr. Metzger: Not the same vicinity, or the same character of land.

The Court: I don't know from his description whether they are in the same vicinity or not.

Q. How far is this last property that you just described, from the property here in question?

A. The one in 19, 7, and this is in 21, 9, that would be two townships north and two east—yes, two east.

Q. Then, is all of this land that you are speaking of, cut over or reforested?

A. Cut over and in various stages of reforestation.

(Testimony of W. H. Abel.)

Q. And do you have in mind any other purchases that you made of land in the vicinity of this land, the land being of the same character as the land here in dispute?

A. Yes, in Township 21, 10. That would be the township in which this road originates, Section 17, I have three forties which I think I bought for $660.00. There is a good growth of timber on that, merchantable timber.

Q. When was that sale?

A. I am under the impression that that was about three years ago. I can supply you with the exact date.

Q. Do you have in mind any other sale where you were the purchaser?

A. Yes, I bought a good many thousand acres, but I haven't just the details before me, just south of Humptulips City, [163] just west of Humptulips City—I bought some nearer market than this—nearer civilization than the land involved, within the past two or three years. I bought considerable amounts at from 50 cents an acre up to a dollar, or perhaps a little more an acre.

Q. What in your opinion is the highest and best use for the lands which the Government has condemned here in this case?

A. It is for the natural growth of a new forest.

Q. In your opinion, has the Polson Logging Company suffered any severance damage by the taking of this road?

A. Not any. This is a mountainous country. It

(Testimony of W. H. Abel.)

is severed by the West Humptulips and its two branches, the Donkey Creek and West Humptulips. It is severed by—that whole area is severed by the high spur or mountain ridge that extends northeast and southwest. Just south of it—southeasterly of this road there is—the road sought to be built, is really a Chinese wall which prevents getting across from one side of the road to the other. There is really no damage to the other, but a very substantial benefit.

Mr. Metzger: Your Honor please, I move to strike the last statement.

The Court: I do not think it was responsive. It will be stricken and the jury instructed to disregard [164] it.

Mr. Metzger: Move the jury be instructed to disregard it as a voluntary statement.

The Court: Yes, the jury are so instructed.

Q. In your opinion, has the Polson Logging Company suffered any severance damage by virtue of the taking of Tract 2 and Tract 3?

A. I think not.

Q. Have you formed any—in your opinion, how long will it be before the lands owned by the Polson Logging Company, hatched in red on Petitioner's Exhibit 2, will have any logs that can be taken off of it, of sufficient size, including, however, the timbered section portion in Section 4, in 21, 9?

A. Well, that is long years in the future, unless there may be some trees on the ground—some windfalls or salvage material that could be reclaimed

(Testimony of W. H. Abel.)

after being on the ground for years, that I don't know, but so far as the new growth is concerned, it is a long time.

Q. Have you formed an opinion as to the fair cash market value of all the property taken by the United States in this proceeding as of October 22, 1943? A. I have.

Q. The road being in the condition that it was, when the Government took it? [165]

Mr. Metzger: I object, if Your Honor please, as irrelevant. The question is the value of the property as of the time taken, to-wit, October 22, 1943, that is the Court's order.

The Court: Objection will be overruled.

Mr. Metzger: Allow us an exception.

The Court: Yes, you will have exceptions to all adverse rulings—both sides will.

Mr. Keenan: I beg your pardon, have you answered the question?

The Witness: I have an opinion.

Q. What in your opinion was that fair cash market value, speaking as of October 22, 1943?

A. I am satisfied that a dollar an acre is a good, fair value for the land as land. If there is any value for—as a truck road, that depends upon whether there would be any logs trucked over it which are controlled, as I understand it, by Polson Logging Company. There is in 4, they have a little timber there which could be taken out in a couple of months —one side, so I see no value to an old grade, when the owner of the grades does not control the timber

(Testimony of W. H. Abel.)

to come over it, so I don't give any value to the road as such. The bridges could not be salvaged.

The Court: I think you have answered the [166] question.

Q. What would be your total value, then?

A. Oh, possibly $300.00. I don't know the exact amount of acreage. I did not pay attention to it.

Q. Assuming that it is two hundred and seventy-six and a fraction?

A. I would say a dollar an acre.

Mr. Keenan: 273.96.

You may cross-examine.

The Court: It is so near the noon hour, I do not think—and I assume the cross-examination will be somewhat extended?

Mr. Blair: Yes.

The Court: So we will take the noon intermission, and if it does not inconvenience the parties, the jurors or the parties, we will reconvene at 1:45, instead of 2:00.

The court will be in recess until 1:45.

(Recess.)

1:45 o'clock p.m.

The Court: Have you completed your direct examination, Mr. Keenan? [167]

Mr. Keenan: I had, Your Honor.

The Court: You may proceed with the cross-examination.

(Testimony of W. H. Abel.)

Cross Examination

By Mr. Blair:

Q. Mr. Abel, I understand that your son and your brother are the M. & D. Timber Company?

A. No, my son and myself.

Q. Your son and yourself?

A. And Mrs. Abel, my wife. We are the sole stockholders.

Q. Of the M. & D. Timber Company?

A. Yes, sir.

Q. And it was in 1939 that M. & D. Timber Company made an arrangement with Polson Logging Company to use a portion of the roads that are under condemnation in this case?

A. No, the arrangement which was in writing, was with A. M. Abel, who was the owner of a half section of timber within the National Forest.

Q. That timber was in the National Forest?

A. Yes, sir.

Q. And that arrangement—that arrangement was made in 1939?

A. I think in February. Our arrangement was made in April, but the arrangement between A. M. Abel and Polson Logging [168] was in February of '39, I think.

Q. And M. & D. Timber Company later succeeded?

A. To an assignment from A. M. Abel.

Q. From A. M. Abel? A. Yes, sir.

Q. And did go in there and log timber and take

(Testimony of W. H. Abel.)

it out over the road that is under condemnation—a portion of the road that is under condemnation in this case? A. That is correct.

Q. And in consideration of the right to use that road, A. M. Abel and his successor the M. & D. Timber Company was to pay 50 cents a thousand——

Mr. Keenan: Object. This is simply injecting the tolls that were charged by the Polson Logging Company for a private operator to use this road, and simply an attempt to capitalize on tolls received, in determining the value of the road.

The Court: The objection will be overruled.

Q. Mr. Abel, the arrangement was that in consideration of the right to use that road, you were to pay 50 cents per thousand for the timber brought out over it, and in addition you were to put it in shape and maintain it as a truck logging road?

A. That was some of the considerations. The arrangement was in writing. Those are a part of it. [169]

Q. A part of the consideration?

A. A part of it.

Q. And how many thousand feet of timber did you bring out over the road, pursuant to that agreement, approximately?

A. Well, I haven't the figures before me, but—have you a statement, because I probably could——

Q. Well, the——

A. (Interrupting): I just don't remember the exact amount, but we logged nearly all the A. M. Abel lands except perhaps sixty or eighty acres.

(Testimony of W. H. Abel.)

Q. Well, the toll amounted to about $900.00, didn't it?

A. A great deal more than $900.00.

Q. A great deal more than $900.00?

A. Why, certainly.

Q. Do you have any recollection of how much it did amount to?

A. No, I do not, but my general impression—of course, that is indicated by a number of other factors, because we took out other timber, too, until finally we had bought about all the private timber and logged it in the basin.

Q. Do you recall how much you paid, on the basis of 50 cents a thousand, under that 1939 agreement?

A. No, I do not. It never occurred to me—I can supply [170] that, but not while I am on the stand now, nor do I have it here now, but we paid 50 cents a thousand on all we took out.

Q. In addition to that, you converted that road to a truck road and maintained it as a truck road?

A. Yes, it was, yes.

Q. Can you tell me approximately how much you spent in converting that to a truck road and maintaining it as a truck road?

A. In a general way, I think, yes.

Q. Approximately what? A. I think so.

Q. Approximately what?

A. Well, I would say somewhere between twelve——

Mr. Keenan: If the Court please, that is ob-

(Testimony of W. H. Abel.)

jected to, how much Mr. Abel spent in putting an abandoned or a railroad grade to a truck road. It has no value on the present value of it.

Mr. Blair: He testified——

The Court: This work was all done before the Government——

Mr. Blair: It is material for two reasons. He testified on direct over our objection—he did testify that he did go in and convert it from a railroad to a truck road, and further, he testified that [171] that——

The Court: What the Court wants to know, Mr. Blair, if this implies money that he spent before the Government took its easement in February of 1942, I think it was.

Mr. Blair: Yes. Now, he was to pay 50 cents a thousand plus converting this road, and the amount of money he spent converting the road is part of the money he spent.

The Court: He may answer. Let's proceed, objection overruled and exception.

A. Well, I think we spent some twelve to fifteen thousand dollars upon that road. Much of that was on these bridges, putting decks—the bridges were impassable, and shaky, and we fixed that up so that it lasted our purposes, although we were warned by Polsons it was not safe to use.

Q. Now, didn't you tell Mr. Polson that you spent about twenty thousand dollars on the road?

A. I think not.

Q. You did not?

(Testimony of W. H. Abel.)

A. No, I think not, but if you have got anything in writing I will be glad to admit it, if that be the fact.

Q. No, it was purely an oral conversation, Mr. Abel.

A. No, of course we used it for other purposes, you [172] understand.

Q. Now, you paid 50 cents a thousand, and you spent about $12,000.00 improving the road, and yet you want this jury to understand that the highest and best use of that logging road is to grow trees on?

A. Yes, for the main reason that there is no more timber to go over it that the Polsons control.

Q. That Polsons control? A. Yes.

Q. Polsons did not control the A. M. Abel timber?

A. For forty-two long years we were unable to get it out. They moved their railroad out without having a chance to get it out.

Q. You owned it? A. My brother did.

Q. Polson did not own any of it?

A. No, it was there marooned, and we did not have a balloon.

Q. Mr. Abel, what is in the watershed of the West Fork of the Humptulips to the north of the country through which this logging road is made out?

A. Well, there is the last virgin stand of Government timber that can feed Grays Harbor.

(Testimony of W. H. Abel.)

Q. And it is a beautiful stand of timber, isn't it? A. Well ,there is a lot of good timber.

Q. If you owned——

A. It is publicly owned, with the exception of a little that we have yet, and a little the Polsons have.

Q. Mr. Abel, if you owned the section—the timber in Section 4—that is the Section immediately above Tract 3, to the north of Tract 3 that is under condemnation in this case, if you owned the timber in Section 4, would this railroad—would this logging road have any value to you for other than growing trees?

A. For a couple of months while the timber is being taken off.

Q. You could take the timber off of it in a couple of months?

A. You remember the Polsons don't pay, too.

Q. Well, let's assume that you owned the timber on Section 5, the Section to the west of Section 4. Would this road have any value to you other than for growing trees—Section 5, the section immediately to the west of Section 4,—would this road have any value to you other than for growing trees?

A. Well, I don't own the Section.

Q. Assume that you owned the Section, would it have?

A. Well, that would be a violent assumption. Of course, if Polson owned the National Forest, sure this road [174] would be valuable to them, but they do not own it, as I understand.

(Testimony of W. H. Abel.)

Q. It would be valuable to anybody that owned the National Forest, wouldn't it?

A. If they owned both.

Q. Yes, if they owned both.

A. I did not understand the necessities of the condemning price was the price of what they had to pay over and beyond the market value.

Q. Mr. Abel, if you owned the timber in Section 5, this road would have a value to you, far over and above the value of growing trees on the present road, wouldn't it?

Mr. Keenan: May I interrupt just a moment, who owns Section 5?

Mr. Blair: I haven't any idea.

Mr. Keenan: I think that Section 5, Your Honor, is owned by the United States Government.

Mr. Blair: It may be.

Mr. Keenan: And part of the National Forest, and certainly the necessity of the Government here for an outlet for its timber has no bearing on the market value of the lands taken. The whole purpose of the condemnation statute is to avoid just such a situation. It has become so bad in this state that loggers have a right to condemn the lands of other loggers in order to [175] get access to their timber.

The Court: I do not think you need any extended argument. I shall overrule the objection and let him answer, and based upon the assumption.

(Testimony of W. H. Abel.)

Mr. Blair: You may answer "yes" or "no" to that question.

Mr. Keenan: Exception.

Q. Mr. Abel, if you owned the timber in Section 5, which is the Section immediately west of Section 4, north of the area now traversed by this logging road, would this logging road have any value to you other than for growing trees?

A. If I owned it, yes.

Q. It would have? A. Surely, surely.

Q. Now, you say that in 1942, I believe it was in February of 1942, after having discontinued the use of this part of the road that you had been using under the agreement with Mr. Polson, made in 1939, you went in there under a license from the Government?

A. Yes. You understand, we were enjoined, although we were at war, we were enjoined and couldn't any longer use this road. There was an injunction pending, and then we brought our condemnation suit, and then the Government came and brought their condemnation suit, and ours dropped, [176] so we entered under the Government permit, the permit dated February 2nd, 1942, and the receipt for the $500.00 paid is dated February 5th, 1942, and they are both in the court room.

Q. You did pay the Government $500.00 for the right to go on there?

A. Yes, and for the maintenance charge. That was conditioned on our maintaining the road.

(Testimony of W. H. Abel.)

Q. You were required to maintain the road, by the Government? A. So we can use it.

Q. So you could use it?

A. Yes, and be responsible if anything happened.

Q. Did you maintain the road? A. We did.

Q. Did you do any work on the road other than maintenance work after you went in there in 1942? A. On the bridges.

Q. None on the road? A. Yes.

Q. I mean other than ordinary maintenance work?

A. Graded it every week, filled up the chuck holes, and saw that the deck of the bridges was in condition to use.

Q. Now, as I understand it, so far as the road itself was [177] concerned, after you went in in 1942 and carried on the ordinary and usual maintenance work on that logging road——

A. Oh, I think we did more than that, because of the complaint of Polson Logging Company that the bridges were unsafe, so the Government just made us get in and fix up the bridges.

Q. So, you did some more work on the bridges there in 1942? A. Yes, sir.

Q. How much did you spend on that?

A. Oh, I don't know. I wasn't there, and——

Q. Well, did you spend as much as a thousand dollars on it? A. More.

Q. How much more, Mr. Abel?

A. Oh, probably fifteen hundred,—maybe more.

(Testimony of W. H. Abel.)

Q. May fifteen hundred dollars?

A. Yes, and that was all under our Government permit, under which we were to keep it so it was safe to use.

Q. The Government required you to do that?

A. Yes, sir.

Q. And also required you to pay $500.00?

A. Yes.

Q. For the privilege of going in and using that road?

A. Well, as I understand it, that was the maintenance charge. That was a deposit for maintenance purposes. [178]

Q. Did you ever get that $500.00 back?

A. No, not that five hundred. I think we got back the second year's deposit, which was $300.00 for the second year, until October—whatever the date was when we stopped.

Q. But, the $500.00 the Government retained?

A. The Government retained, but we were refunded the three hundred.

Q. The three hundred? A. Uh-huh.

Q. Now, you were talking this morning about a railroad that you sold, in the Township, as I understand it, to the east of the Township where the road is under condemnation?

A. No, I didn't say that I sold it. It was not sold at all. The rail was taken up and the grade is still there.

Q. And that road belongs to who?

A. Donovan Corporation.

(Testimony of W. H. Abel.)

Q. Donovan Corporation? A. Yes, sir.

Q. And the fact of the matter was, that Polson had the timber to the west of Donovan Corporation?

A. Yes, sir.

Q. Schafer had the timber to the east? [179]

A. No, Simpson.

Q. Simpson had the timber to the east?

A. Yes.

Q. Simpson also had the timber to the north?

A. No, Simpson had it checker-boarded in the upper Winoochie in 22, 8 and the timber due north, and much of the other timber was owned by the Forest Service. There was just three owners.

Q. And Simpson?

A. As in this situation.

Q. Simpson Logging Company took the Government owned timber out over the Winoochie Bridge to the north, didn't they?

A. No, much of that timber is still there—practically all of the timber in 22—in 22, 8. I don't believe 22, 8, has been logged at all. It is principally Forest Service timber, and it all depends on the future policy of the Government as to when it comes out.

Q. But, it will undoubtedly go out through Simpson to the north? A. Well, Simpson is east.

Q. Well, east or north?

A. Either there or over the Polson road, unless others are permitted by use of this road to cross the east fork—the ridge—the east Humptulips ridge

(Testimony of W. H. Abel.)

—and invade that [180] territory so it comes to Grays Harbor.

Q. So you think the road under condemnation here may reach over to the East Forks of the Humptulips, as well as taking the timber in the West Forks basin?

A. Well, the ridge between it, certainly.

Q. So they may use this road to take out more than the billion, four hundred million?

Mr. Keenan: That is objected to, the use to which the United States——

The Court: I think I shall sustain the objection. I ruled on that matter yesterday.

Q. Now, Mr. Abel, you said that you were litigating with the Polson Logging Company at the time that they had gotten an injunction to restrain you from using this road? A. Yes.

Q. And you were litigating with them at the time the Government started this condemnation proceeding? A. Yes, sir.

Q. And since that time there has been further litigation brought against you by Polson?

A. He sued us for $28,000.00 for using it under our Government permit.

Q. And you have a very direct interest in the outcome of this litigation? [181]

A. I certainly have.

Q. You certainly have?

A. I certainly have.

Q. As a matter of fact, you had a lot to do with the instigation of this litigation?

(Testimony of W. H. Abel.)

A. I had something to do with it and I would be glad to tell you what it was.

Q. As a matter of fact, you expect to buy timber here in the National Forest and take it out over this very road, Mr. Abel?

A. I hope we have the right in common with every citizen. I hope that everybody can't be shut off. I hope that nobody will be shut off.

Q. But, when you buy that timber, Mr. Abel, you will pay a dollar and a half or two dollars a thousand more if you have the free use of this road than you would pay if you didn't have the free use of this road?

A. Well, I will never pay it to Polson Logging Company. I simply won't pay tribute.

Q. You won't pay tribute?

A. I will not pay tribute to get Government——

Q. Yet you say the highest and best use of that logging road is to grow trees? A. Yes.

Mr. Blair: That is all. [182]

Redirect Examination

By Mr. Keenan:

Q. Mr. Abel, what was the occasion of this injunction suit brought by the Polson Logging Company against you?

Mr. Blair: We object to that as immaterial.

The Court: Objection will be overruled.

Mr. Blair: The question goes to his interest as a witness.

The Court: That is true. For that reason I am overruling the objection. We do not intend to try

(Testimony of W. H. Abel.)

that case, but in so far as it may throw any light on the interest of this witness in the outcome of the case, it is competent.

A. The Government was in need of timber. This country was at war. We were——

Mr. Blair: Now, if Your Honor please——

The Court: Yes, I will sustain the objection to the statement made. The jury are instructed to disregard it.

Mr. Metzger: I ask the witness be instructed to confine his answers to the question.

The Court: The witness is an eminent member of the bar of this state.

Mr. Metzger: I realize that, and I realize also his habits. [188]

Q. Mr. Abel, what was the immediate cause of the injunction suit—what were you being enjoined from doing?

A. From taking timber from the National Forest.

Q. Over this road? A. Over this road.

Q. Had you previously had a contract with the Polson Logging Company?

Mr. Blair: We object, if the Court please, as immaterial to any issue in this case.

The Court: The objection will be overruled. The question is not finished, but I assume——

Mr. Blair: Well, the answer was already started, was the reason I made the objection.

The Court: Your objection is well taken in that regard. Finish your question.

(Testimony of W. H. Abel.)

(Question read.)

Q. (Continuing): Which permitted you to use this road?

A. Yes, as to the A. M. Abel half section.

Q. Had you previously had a contract with the Polson Logging Company which permitted you to haul logs out? A. Under an assignment, yes.

Q. From the Forest Service?

A. No, then we were enjoined from taking the Forest Service timber out, whereupon we brought an injunction suit, and then later we brought our condemnation suit, [184] and then the Government came in, in February of 1942, with its condemnation suit, and we couldn't go on with ours, so we dropped it, and then on April 8th we made another settlement with Polson and bought the timber on the southeast quarter of 3, and the suit for damages for taking out the timber they sold us, among other things. There was no other way to take it out, We had three years to take it out.

Mr. Metzger: Your Honor please, I move to strike the last part of the witness' answer as irresponsive, volunteered, and subject to objection I made before. The witness is continuing volunteering and not answering questions.

The Court: I think the answer may stand. I will allow you an exception. Motion to strike denied.

Q. How much did you spend—strike that.

I believe you mentioned spending $15,000.00 on

(Testimony of W. H. Abel.)

this road before the Government stepped in the picture?

Mr. Blair: $12,000.00 I believe is the testimony.

Mr. Keenan: Twelve to fifteen.

Mr. Blair: All right.

Q. Did the Polson Logging Company spend any money at all [185] on this road that you know of, at any time since you first started to haul logs over it in 1939?

A. I am certain that it did not.

Mr. Keenan: I think that is all.

Mr. Blair: That is all.

(Witness excused.) [186]

PAUL H. LOGAN,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Logan?

A. Paul H. Logan.

Q. Where do you reside?

A. In Portland.

Q. How old are you? A. Forty-six.

Q. And what do you do for a living?

A. I work for the United States Forest Service.

Q. In the Regional Office?

(Testimony of Paul H. Logan.)

A. In the Regional Office, at Portland.

Q. Have you had any academic training in forestry?

A. Yes, I studied forestry at Cornell University, and received a degree in that science in 1926.

Q. And how long have you worked for the Forest Service?

A. I went to work for the Forest Service in 1927, in the spring.

Q. And what was your first assignment—first, where were you and what were your duties?

A. In 1927 I was assigned to the Olympic National Forest, [187] whose headquarters were in Olympia. I was stationed at one of the camps of the Polson Logging Company and assigned the responsibility of scaling logs of Government timber which was being cut by Polson Logging Company.

Q. And how long were you on that assignment?

A. Approximately two years.

Q. And then what did you do?

A. I moved to other timber sales on the Olympic National Forest, doing similar work, scaling logs and general administration of the particular sales of which I was assigned at the time.

Q. And how long were you——

A. That continued until early in 1930 when I was given the assignment of making what is known as the resource survey of the entire Olympic National Forest, the objective of that job was to determine the quantity and distribution of species, the

(Testimony of Paul H. Logan.)

location of the volume of timber, both in Government ownership and private ownership.

Q. Now, on that assignment—how long did that assignment last?

A. That job continued through 1930, '31 and '32, and a portion of '33.

Q. What was your next assignment? [188]

A. My next assignment was the general administration of timber sales and of acquisition of purchases of land by the Government on the Olympic National Forest, working out of the Olympia office.

Q. What date does that take us up to?

A. That takes us up to early in 1937. Then, I transferred from—was transferred from the Olympic National Forest to the Snoqualmie National Forest, with headquarters in Seattle, and was placed in charge of all the timber sales on the forest, and all of the land acquisition work, as well as the responsibility for fire control. That job lasted until the spring of 1939, when I was again transferred to the—I was transferred again this time to the Regional Office in Portland, and assigned to the job of preparing for the settlement of the lawsuit between the Northern Pacific Railway Company and the Government, a suit in equity to determine the value of their land grant holdings, which had not yet been patented to the railroad.

Q. Was there any land in this area involved in that case? A. Yes.

Q. General area?

A. Yes, some of the lands involved in the North-

(Testimony of Paul H. Logan.)

ern Pacific lawsuit were located in the general vicinity of the property that has been taken. [189]

Q. Where were they with respect to this property?

A. They were to the north of this property in general, embracing most of the odd numbered sections, 1, 3, 5, 7, and so forth, in practically all the West Humptulips drainage within the boundary of the forest.

Q. By the way, something was said about checker-boarding, by the previous witness. What is meant by "checker-boarding"?

A. The usual inference is, that one party or agency will own sections 1, 3, 5, 7, 9, and within a township, and another party or agency or holder will own sections 2, 4, 6, 8, 10 and so forth. The word "checker-boarding", is descriptive. It shows the ownership pattern in black and white. Johnson owns 1 and 3 and Tom Smith owns 2 and 4.

Q. How long were you on this Northern Pacific case assignment?

A. That job lasted from the early spring in '39 until the latter part of 1940.

Q. And then what did you do?

A. Why, I was then assigned the job of assisting with the general timber sale—timber management work throughout the entire region. That entailed appraising National Forest timber for sale. That also included appraising privately owned lands and timber lands, some cut over, [190] which the Government was in the process of acquiring through

(Testimony of Paul H. Logan.)

purchase, through exchange procedure, which is virtually purchase. It also included checking on the men who were responsible for the administration of those sales, most especially the scalers, to see that their scaling technique was proper and correct, and that justice was being done to the Government, as well as to the operators, and some training in connection with the scaling and grading work.

Q. Now, in connection—that is your present assignment, is it not?

A. Well, I finally got back to that, but there is some intervening.

Q. Have you—the Forest Service, ever acquired cut over lands from time to time?

A. Yes, the Forest Service had acquired a lot of cut over lands.

Q. Have you had anything to do with the acquisition of those cut over lands?

A. Yes, I have. The lands which in those cases with which I had some direct connection or responsibility, total about 19,000 acres.

Q. During the time you were working on the Northern Pacific case, was it necessary for you to make any investigations of the sales of cut over lands? [191]

A. That was one of the things that we had to do. The primary purpose of that—the objective of the suit, was to determine the equitable, or the fair cash market value of the three hundred and twenty odd thousand acres that were involved in the litigation,

(Testimony of Paul H. Logan.)

and in doing that I checked all the records available on sales, on all types of forest lands.

Q. Actually, there were no cut over lands in dispute?

A. Well, very slight—very minute, almost infinitesimal part of that 320,000 acres had cut over.

Q. Have any burned over lands?

A. Lots of burned over lands, yes.

Q. Now, are you familiar with the property involved in this case? A. I am.

Q. Have you examined that property?

A. I have.

Q. When did you examine it?

A. Why, I first was on the property in—on part of the property in 1927. From 1927 to 1937 I was over it a number of times, but I don't recall the exact dates.

In connection with my work in the Northern Pacific lawsuit, I had occasion to look at some of the lands again. That is also true at the time I was working on the research survey from 1930 to subsequent [192] years, and in connection with this case I was first on this—over the road and over most of the property in early March of 1942. After that, I have been over the road at least four times, early this fall.

Q. What condition was this roadway in when you first examined it in 1942, I believe you said?

A. Well, the road was—had been at that time converted from a railroad grade to a truck road. It was passable by car, fairly well closed in with reproduc-

(Testimony of Paul H. Logan.)

tion on the side, very narrow passageway. Sufficient room for one automobile to pass, or one truck.

The bridges were enough to make one's hair stand on end, almost, as you drove across. There were no guard rails or such things, but they did hold up the car that I was using.

Q. What was the character of the ground cover on the lands adjacent to the road?

A. Well, all of the lands have been cut over—had at that time been cut over, and from my own knowledge and from checking of the records in the County offices, that cutting I found extended from about 1918 to about 1939.

Subsequent to the logging operations there had been some fires. I did not have the date of the fires, but some had occurred after the logging and certain had covered later years after the logging. [193]

The lands on the right of way adjacent to the road are fairly well stocked with reproduction of varying ages from a few years—two or three years to as much as eighteen to twenty years.

Away from the immediate grade, the reproduction we would say was spotty, in some places fair—some places none, some places good.

Reproduction consists primarily of hemlock, Douglas fir, a little bit of cedar, some white fir, some white pine, which, by the way, has been almost entirely—the trees diseased, and some Sitka spruce, which is suffering from damage caused by bud worm. In those places which are not well stocked with useful reproduction, there is a considerable cover of

(Testimony of Paul H. Logan.)

bracken fern, willows, some cranberry marsh, grasses, and a little bit of alder—considerable alder in places along the railroad grade. None of the timber—none of the trees that are along the road is of merchantable size. There is no merchantable timber.

The lands away from the highway, I say the reproduction is fairly well spotted, but it has been logged at one time or other, about 1918.

Q. How do you account for the fact that the timber is spotted away from the road, rather than on the road, or immediately adjacent to it? [194]

A. Well, construction of a railroad grade, the top layers of vegetable—decomposed vegetable matter known as the duff is torn away, upset and moved, and it exposes mineral soil, which is conducive to regeneration,—to the start of new trees. Frequently, while logging operations are still going over a logging road, one sees small trees coming through the mineral soil, whereas just beyond the grade over in the logged area where the mineral soil has not been generally disturbed, there would be absolutely no reproduction. You will find little trees growing along the railroad grade. That condition has continued, so the reproduction of the young trees along the immediate road where the soil—the mineral soil has been exposed, are pretty well established in places, and beyond them the reproduction is not as far advanced, or is not yet established.

Q. Have you checked on the dates of cut on the various sections in this township?

A. Yes, I checked that at the office of the County

(Testimony of Paul H. Logan.)

Assessor, to whom owners of timber lands make annual reports on their cut.

Q. Can you tell us on what dates those various sections were cut over?

A. I have a map, Mr. Keenan, which I—— [195]

Q. Is this the map?

A. That is the map which is a replica of the map found in the County office.

The Court: I think you should show that to the counsel for the respondent, and maybe you can agree upon it.

Can you agree upon the admissibility, Mr. Metzger? Do you agree upon it?

Mr. Metzger: We do not think there is much materiality to it, Your Honor.

The Court: But, aside from that, do you agree upon its admissibility?

Mr. Metzger: I don't think we will object.

Mr. Keenan: What is the number on there?

The Clerk: 18.

Q. You now have in your hand Petitioner's Exhibit No. 18 for identification. Will you tell us briefly what that is, and who made it?

A. That is a reproduction of a map found in the County Assessor's office, which shows the years in which the lands and the portion of Township 21-9 and 21-10 were logged.

Q. And did you check——

A. I took the original from the County records and had the map prepared by one of our draftsmen.

(Testimony of Paul H. Logan.)

Q. Did you also check the statements filed by the various land owners with the County?

A. No, sir, the County takes those statements each year, and from the sketches which accompany those statements, they indicate on a key map which sections that particular owner claims to have logged that year.

Q. Is that an exact copy?

A. This is an exact copy, except that the scale has been stepped up from a two inch to a mile to a four inch to the mile, and is placed on a base—on the same base as the exhibits on the easel.

Mr. Keenan: At this time, the petitioner offers in evidence Petitioner's Exhibit No. 18 for identification.

The Court: It will be admitted in evidence.

(Whereupon, map referred to was then received in evidence and marked Petitioner's Exhibit No. 18.)

Q. Now, have you made any—are you generally familiar with the values of cut over lands in Grays Harbor County? A. I am.

Q. Have you made any preparation to testify to value in this case? A. Yes, I have. [197]

Q. What have you done by the way of preparation?

A. Why, I have, in the first place I have looked on the property and compared this property with similar properties with which I have been familiar previously. I formed my opinion as to value from that comparison. I further checked at the office of

(Testimony of Paul H. Logan.)

the Treasurer of the County on recent sales to individuals in this immediate vicinity. I talked with some people who had purchased lands in this vicinity recently, alluding primarily to Mr. Abel.

Q. Have you formed an opinion as to the fair cash market value of the land taken in this case in the form that it was when the Government took it, but basing your valuation or your fair cash market value as of the date March 22, 1943?

Mr. Metzger: I object, if Your Honor please, as wholly improper. State the valuation and the condition of the property as of date October 22, 1943.

The Court: I do not want counsel to be misled or misunderstand the Court's ruling in the pre-trial hearing, giving the respondent the option to select a date when the Government first went into possession of this property or the date when they filed their declaration of taking in fee.

Mr. Metzger: If Your Honor please, there [198] wasn't any option about it. That was a contest as to which date was the date, and Your Honor decided it was October 22nd, the order so states.

The Court: The Court's recollection of my own statements and the record would bear me out. If it does not, I definitely rule now the market value when the Government first went in under its original taking under an easement, then they were when they went in under their fee simple taking, and all improvements made in the interim between the first taking and the last taking must be excluded in es-

(Testimony of Paul H. Logan.)

timating the value—that is, improvements made by other than the respondent.

Mr. Metzger: Your Honor, I except to Your Honor's remark, because the order is, I believe, is in writing and we have a right to——

The Court: The Court has just examined its order here again, and notes that on its own motion it vacated a previous order that it had made on the ground and theory that it was in error when it made the previous order, which would have vacated entirely the actions of the Government in the first proceeding here. Proceed.

Mr. Keenan: That calls for just a "yes" or "no" answer.

A. Yes, sir, October 22, 1943, is the correct date.

Mr. Keenan: I beg your pardon, it should be [199] October 22, 1943.

Q. Have you formed an opinion as to the value of this property on October 22, 1943?

A. Yes, I did.

Q. What in your opinion was the fair cash market value of the property which is condemned in this case, on October the 22nd, 1943?

Mr. Metzger: Object, if Your Honor please. This witness has not shown himself qualified. He has qualified himself by his own showing, by testimony or statements of Mr. Abel who has already been a witness here. His testimony is hearsay.

The Court: I know, Mr. Metzger. He went farther than that, and stated he examined much land for the Government in years preceding, and the ob-

(Testimony of Paul H. Logan.)

jection will be overruled, but I am going to, before this witness answers, and I think I overlooked it in the other—these witnesses, because it is a material issue in every case of this nature, and certainly in this case, should base their estimate upon what they consider to be the highest and best use of the land involved, and of course that question has not been asked.

Mr. Keenan: That is an omission on my part with this witness. [200]

Q. What in your opinion is the highest and—subtract the last question.

What in your opinion is the highest and best use to which this land could be put, speaking as of the time the Government took it?

A. Well, it is my opinion the highest and best use would be for reforestation purposes, the growing of timber and for the protection of adjacent lands from fire.

Q. Now, what in your opinion is the fair cash market value of this property—that is, the property condemned in this case on October the 22nd, 1943?

A. It is my opinion that the property was—the fair market price of the property was a dollar per acre.

Q. That is a dollar an acre straight through?

A. Straight through, a total of $273.93.

Q. Mr. Logan, have you ever testified in valuation cases before?

A. I never have been on the witness stand before.

Mr. Keenan: You may cross-examine.

(Testimony of Paul H. Logan.)

Cross Examination

By Mr. Metzger:

Q. Mr. Logan, in this Exhibit 18 of yours, you show, as I understand it, a map covering the same area as Exhibit 2, is that correct? It is this map on the [201] board, being Exhibit 2?

A. That is right.

Q. And all of the coloring or cross-hatching on your Exhibit 18, indicates land that had been at one time or another, prior to 1941, logged off?

A. And the year in which it was logged.

Q. Yes. A. That is correct.

Q. Was that all logged from these roads that are shown on Exhibit 2, or from the logging railroads that preceded those truck roads?

A. I would have to make an assumption to answer that question, Mr. Metzger. I did not observe how it was. If you would like for me to assume——

Q. What is your opinion?

A. My opinion is that they were removed by the railroad for the most part, except that in the upper portion, which area I can point out to you——

Q. But, it was all moved either off of the railroad on these locations, or off truck roads on these locations and spurs therefrom?

A. I think that is correct.

Q. About how many thousand acres were so logged?

A. Well, that is a little hard to answer right off. It is virtually a township there, 13,000 acres. [202]

(Testimony of Paul H. Logan.)

Q. Well, a township is, roughly speaking, something in excess of 20,000 acres, isn't it?

A. That is right, 22,000.

Q. So you would say that there was about 23,000 acres tributary for logging purposes, to these roads outside the National Forest, with the exception of maybe 160 acres?

A. That is not quite right, because quite a lot of that in the southeast of that particular township——

Q. How much would you subtract, then? Would you say as much as 20,000 acres outside of the National Forest that was tributary for logging purposes? A. Oh, approximately.

Q. Well, how much north in the National Forest for logging purposes is accessible or tributable to come out over these roads?

A. Owned by the same party?

Q. No, how much timber?

Mr. Keenan: That is objected to.

The Court: I think that I will sustain the objection. You mean how much Government timber?

Mr. Metzger: I don't care; how much timber?

The Court: I will sustain the objection unless you qualify your question to cover privately held timber. I thought I made it clear yesterday on [203] this issue. I don't mean to keep your from making your offer of proof. The position of the Court is, and the jury will be charged in due time, that no estimate can be made on the hauling of the National Forest products over this or any other road within the next year or ten years or any other time.

(Testimony of Paul H. Logan.)

Mr. Metzger: Well, Your Honor, we eventually may.

The Court: If you want to protect the record by an offer of proof either in the presence or absence of the jury,——

Mr. Metzger: We will do that at the proper time.

Q. How much private holdings are there in the National Forest, in the Olympic National Forest, in this particular Humptulips basin?

Mr. Keenan: That is objected to, Your Honor, unless the private holdings are the private holdings of the Polson Logging Company.

The Court: Oh, I think I shall let him answer the question to determine the situation. You are limiting it to this particular watershed, I assume?

Mr. Metzger: Yes.

Mr. Keenan: It is also objected to, Your Honor, on the further ground that it must be land which [204] is abutting or adjacent to the present existing grade, which is in dispute here.

The Court: Well, probably the Court has taken for granted this is the only way that they can come out—the only watershed and only grade they have to come out. I don't know. I think you will have to qualify your question a little more, Mr. Metzger.

Q. Well, Mr. Logan, how much privately owned timber is within the boundaries of the Olympic National Forest and within the watershed or basin of the West Fork of the Humptulips River, that comes out over this road, in your opinion?

Mr. Keenan: That is objected to, Your Honor.

(Testimony of Paul H. Logan.)

It would make no difference whether the timber to come out over this road was Government owned timber or privately owned timber.

The Court: Objection will be overruled and exception allowed.

The Witness: May I have——

Mr. Keenan: My understanding, Your Honor, that it is not—it will not be necessary in this proceeding for either one of us to take an exception to any ruling?

The Court: That is right, an adverse ruling, the record may show you may have an exception without [205] so claiming.

A. I have not made a recent check on the total volume of timber in private ownership in the drainage of the West Fork of the Humptulips, within the boundaries of the forest. I have made a check on lands owned by the Polson Logging Company within that drainage.

Q. You made a survey, you said, on direct examination, of the privately owned timber and the Government owned timber in that area?

A. That survey, sir, was conducted from 1930 to 1935, since which time many changes have taken place.

Q. You mean that timber in that particular area has been to any considerable extent logged off?

A. Some of it has, sir.

Q. Where?

A. Well, southeast of Sections 3, 4, 1.

Q. Southeast of Sections 3 and that—how did

(Testimony of Paul H. Logan.)

that timber—was that timber removed, if you know? It was removed by truck over this road as shown on this map, was it not?

A. I believe that is right.

Q. All right, what other timber in the National Forest that is gone since you made your survey?

A. Some from Section 2, also, a sale of National Forest timber. [206]

Q. Some from Section 2, and that also was taken out over this truck road? A. I believe so.

Q. That is right. Anything else?

A. I think some was moved from Section 6.

Q. Some in Section 6? A. I believe so.

Q. That also came out over the other branch of this truck road, did it not? A. Uh-huh.

The Court: You will have to answer.

A. Yes, excuse me.

The Court: The Reporter does not get the nod of your head.

Q. The Forest Service made a sale this summer, the timber on which is now being moved out over this truck road?

A. I think it has not yet started to move there, yes, sir.

Q. Well, it has already, isn't that a fact?

A. I don't think it has started to move yet. It had not the last time I checked.

Q. But when the sale was made it was contemplated? A. It will move shortly, yes, sir.

Q. And all of the sales that the Government

(Testimony of Paul H. Logan.)

contemplates of timber in that area will come out over this road?

Mr. Keenan: That is objected to, if the Court please.

The Court: I shall sustain the objection to the question. I shall have to sustain the objection.

Mr. Metzger: Well, we offer to prove by this witness that his answer to that question would be in the affirmative.

The Court: I am assuming that the petitioner objects to your offer of proof.

Mr. Keenan: I object to the offer of proof. I think it is irrelevant and immaterial.

Mr. Metzger: Allow us an exception.

The Court: Mr. Metzger, will you take some little time yet this witness?

Mr. Metzger: We will. It will be a little bit of time, your Honor.

The Court: It is a little after the hour and I thought we might take the afternoon intermission, unless you would be through with another question or two. Then there may be some redirect, so we will take the afternoon intermission now, gentlemen of the jury, for fifteen minutes.

(Recess.)

Q. Mr. Logan, I understood you to say that the Government [208] had recently made a sale of timber. I believe it is in Section 2, 21, 9, which was to come out over this road, but you did not know whether it was yet being moved out or not, is that correct? A. That is not quite correct.

(Testimony of Paul H. Logan.)

Q. Well, will you correct me?

A. The Section of the timber that I said I thought had not been moved, was not located in Section 2. The timber in Section 2 is sold, and operated some time ago. It was complete.

Q. That is complete? A. Yes.

Q. Was there not a sale advertised in September of this year for timber in Section 2, 21, North 9 West, and Sections 34 and 35, 22, North 9 West?

A. I believe that is correct, sir.

Q. Isn't that the sale that you are referring to?

A. No, the one that I alluded to, that sale was advertised and made to Ed Picko. The sale to which I first alluded was made to Don McKay.

Q. Well, this sale to Picko, whatever the name is, the timber will come out over these roads?

A. I presume that it will.

Q. Is coming out now?

A. Has not yet started to move, sir. [209]

Q. I see. How much is involved in that sale?

A. I don't recall.

Mr. Keenan: If the Court please, I object.

The Court: I shall sustain the objection. The needs of the Government in the acquisition cannot be effected by placing the value of it, or the use to which they are going to put the land they are taking—are not a matter to be taken into consideration in fixing the highest and best use of this road, or this land when held by the respondent.

Mr. Metzger: You Honor, with all due deference, I believe the law is unbrokenly——

(Testimony of Paul H. Logan.)

The Court: I do not care for an argument.

Mr. Metzger: I realize. I would like an opportunity some time to discuss that question and present that argument to the Court.

Q. And the Government is contemplating another sale in that immediate vicinity?

The Court: I sustained the objection.

Mr. Keenan: That is objected to for the same reason, your Honor.

Mr. Metzger: Well, if your Honor please, we offer to prove that the witness, if permitted to answer, would answer that question in the affirmative.

The Court: Well, the Court is taking the [210] position that what the Government intends to do with this road, and when and how and where and to whom it will sell the timber, that might move over this road or otherwise, is not a matter material in fixing the value of this road.

Q. Mr. Logan, in advertising this sale in Section 2, 21, North Range 9 West, and 34 and 35, Township 22 North, Range 9 West, the advertisement was published, was it not? A. Yes.

Mr. Keenan: That is objected to. I conceive that irrelevant and immaterial as far as applied to any issue in this case is concerned.

The Court: He has answered in the affirmative. I don't know what the purpose of this question is.

Q. And in advertising that sale, it was stated that this road would be available for the removal of the timber?

(Testimony of Paul H. Logan.)

Mr. Keenan: That is objected to, your Honor.

The Court: Sustain the objection.

Mr. Metzger: Exception, and again we offer to prove that it is a matter of public advertisement that the Government and all persons generally in considering market value are advised by the Government that the propose to use this road as a means of removing this timber. [211]

The Court: Yes, but Mr. Metzger, if you assume that to be a fact, it probably is a fact, but that still does not become a factor in fixing the value the Government must pay for the road, or the land.

Mr. Metzger: Any purchaser or seller would take that into consideration in arriving at what they would pay.

The Court: That may or may not be the objective the Government had in acquiring this right of way.

Mr. Metzger: They stated so in this petition this declaration of taking.

The Court: It is not material to the jury in placing the value they are going to place upon it.

Mr. Metzger: Allow me an exception.

The Court: Yes.

Q. Mr. Logan, as I understand you to say, that when you first came on this land, as far as any connection with this case is concerned, in March of 1942—— A. That is right.

Q. And the roads were then—had been previously and were then in operation as previously con-

(Testimony of Paul H. Logan.)

verted, and were then in operation as logging truck roads? A. That is right.

Q. That is right. Do you know of any improvements that [212] have been made to those roads since that time, other than the rebuilding of the Stevens Creek Bridge and the replacement of the O'Brien Creek Bridge with a fill?

A. I don't know.

Q. Well, you don't know whether any have been done or you don't know anything about it?

A. I don't know that any have been done.

Q. You don't know that any have been done. You say, then, that with the exception of the replacement of the Stevens Creek Bridge with a new bridge, and the replacement of the O'Brien Creek Bridge with a fill, no improvements have been made to this road since then, in that time?

A. I wouldn't say that, Mr. Metzger, no, sir.

Q. Is that not the fact? A. I don't know.

Q. So far as you know, it is a fact?

A. I don't know.

Q. Well, I mean you were on it—you said you had been on it several times for the purposes of this case. So far as your observation has gone, that is the fact?

A. Somebody has improved the road considerably between the time I was first on it and the last time.

Q. In other respects than these two? [213]

A. Yes, sir.

Q. Where and how?

(Testimony of Paul H. Logan.)

A. Why, there is evidence that it has been graded, and evidence that there has been additional clearing. There is evidence that the bridges not replaced have been worked upon.

Q. When was the last time you were on it?

A. In September of this year.

Q. What date in September?

A. I would have to check my diary to tell you specifically. I think it was the 11th, was the last time I was on it.

Q. The 11th. Now, Mr. Logan, probably one last question. Do I understand you that in your opinion the highest and best use of this—what you have testified was, in March of '42, a usable truck road, and was in September of 1945 a usable truck road—that the highest and best use of it is for growing trees, is that right?

A. That is right.

Q. That is your opinion?

A. That is right.

Q. You want the jury to believe that that is the best opinion you have got on the subject?

A. That is right.

Q. And that applies also, does it, to tracts 2 and 3, that the highest and best use of that ninety acres is for [214] growing trees? A. I do.

Mr. Metzger: That is all.

Redirect Examination

By Mr. Keenan:

Q. Mr. Logan, you say the highest——

Mr. Metzger: Just a minute. Well, what con-

(Testimony of Paul H. Logan.)

nection do those—the only connection with these tracts is then that with the rest of the road, you are going to grow trees on them, is that it?

The Witness: The chances are that from a portion of those tracts 2 and 3 some gravel would be removed to keep the road up. However, the gravel on tracts 2 and 3 is no different than the gravel on lots of other lands immediately adjacent. In tracts 2 and 3 there is enough gravel to keep up several miles of road, more than is involved in this.

Mr. Metzger: Where is there any gravel on tract 2?

The Witness: On tract 2, sir?

Mr. Metzger: Where on tract 2? You have got ten acres there now. Tell me where?

The Witness: Well, I suspect you could find gravel almost any place on those ten acres. [215]

Mr. Metzger: That is your suspicion?

The Witness: Our engineers——

Mr. Metzger: I did not ask what your engineers—I am asking you for your testimony and what you know. Where is there any gravel on tract 3?

The Witness: Well, there is some right along the road, you can see it, sir.

Mr. Metzger: What part of the road?

The Witness: Well, from most of the road through tract 3.

Mr. Metzger: Oh, there is a road through tract 3?

The Witness: Yes, sir.

(Testimony of Paul H. Logan.)

Mr. Metzger: Improved road through tract 3?

The Witness: The road is through, yes. It is usable and passable.

Mr. Metzger: Pretty fair road?

The Witness: That is a pretty fair road.

Mr. Metzger: And it goes through tract 2 as well?

The Witness: That is right.

Mr. Metzger: So far as you know, though, you still insist that the use of those two tracts is to be for the growing of trees?

The Witness: Yes, sir. [216]

Mr. Metzger: That is all.

By Mr. Keenan: (Resumed):

Q. Mr. Logan, when you are referring to the highest and best use of this land, do you consider the highest and best use to the Government, or do you exclude that? A. I excluded that.

Mr. Keenan: That is all.

Recross Examination

By Mr. Metzger:

Q. The highest and best use by the Government is the use for which this land is available, is it not?

Mr. Keenan: That is objected to, your Honor. It is obvious here that the Government is going to put the highest and best use, but that highest and best use does not relate to the Government use.

Mr. Metzger: If that is the highest and best use, that is the rule, whoever it is.

The Court: I don't think that is the rule of law.

(Testimony of Paul H. Logan.)

The use they put it to is not necessarily the fact, whatever they may see fit to use it for under their sovereign right to take it cannot be made the determining factor in what actually was the highest and best use at the time they did take it. [217]

Mr. Metzger: It is not a question of what then was the highest and best use. The question is, what is the highest and best use to which it may reasonably be put in the reasonably be put in the reasonable future by anybody, Government or anybody else.

The Court: Well, the law might be subject to some qualification there. I think I shall sustain the objection.

Mr. Keenan: That is all.

(Witness excused.) [218]

NORMAN PORTEOUS,

produced as a witness on behalf of the Petitioner, after first being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Your full name is Norman Porteous, is it?
A. Yes.
Q. You reside in Seattle, do you, Mr. Porteous?
A. Yes, sir.
Q. How old are you? A. 54.

(Testimony of Norman Porteous.)

Q. And what is your occupation?

A. Forest Engineer.

Q. And you have offices in Seattle?

A. I do.

Q. What are the duties of a Forest Engineer?

A. They cover——

Q. I mean practicing, such as you do?

A. Well, cruising the timber, locating logging roads, railroads and truck roads, appraising timber and forest management. In some cases, selling and buying and selling of timber.

Q. Now, how long—or can you give us a brief resume of your experience in the timber business, or as a consultant [219] on timber matters, or anything of that kind?

A. I started in 1908 in British Columbia, engineering.

Q. Will you speak up just a little bit?

A. As a chain man, and rod man, and instrument man.

The Court: Speak a little louder.

The Witness: In 1911, I became chief of a survey party, in surveying timber and to 1915.

In 1915 I went to work for Clark and Hetrick, Forest Engineers in Vancouver, and I was with them until the fall of 1917.

'17 to the spring of 1918, I was with the Imperial Munition Board, in northern British Columbia, looking for airplane spruce.

1918 to 1919 I worked with James DeLacy and Company in Chicago and Seattle in cruising, and

(Testimony of Norman Porteous.)

in 1919 I cruised and mapped six thousand acres for the Goodyear Logging Company. In the fall of 1919 I opened an office in Seattle. From then on under my supervision, the principle work we did was—we did engineering work for the Eatonville Lumber Company. Stimpson Mill Company, both at their skip mill chief operation, and North Bend Timber Company, and in 1921, following the slow down, in western Clallam County we looked over—my men looked over, under my supervision, seventy thousand acres to determine what damage had been done from timber being thrown by the wind. This information was used by the county for changing the tax rates on the different forties, as to the amount of damage done.

In the fall of 1921 we cruised and mapped about eight thousand acres of the St. Paul and Tacoma Lumber Company.

In 1922 I appraised the Vancouver Lumber Company's properties in British Columbia for a bond issue, and I set a value on that timber, and the value was close to three million dollars.

In 1922 we cruised about twenty-five thousand acres for the St. Paul and the Tacoma Lumber Company.

In 1923 I appraised the Carlisle Lumber Company property at Unalaska. This was a valuation of about three million dollars of timber.

In 1924, for Governor Kerby of Texas I cruised twenty thousand acres in British Columbia.

In 1925, for the Southern Pacific Company I

(Testimony of Norman Porteous.)

gathered together material, principally for the County records of what was timbered and what was not, and who owned it in California, from Fresno north, all of Oregon, all of Washington, Idaho, and Montana and some in the Rockies, west. [221]

In 1927 the merger of the Hammond and Whitney properties. I cruised the property with my men and our cruise was accepted on both sides as setting the quantities of timber that went into the merger.

In 1928 I cruised—we cruised in Clallam County eighteen thousand acres, and I set a value on it of a million one hundred thousand dollars and it was sold for a million dollars.

In 1929 for the First National Bank of Chicago, I went over the properties of Coeur d'Alene Mill Companies and appraised the timber company and their logging railroads and their saw mill, and appeared in the Federal Court of Chicago and testified to these values. Later in '29 and '30 for the Shoveland-Carpenter-Clark Company, I worked on a comparison of wages paid in the woods in Oregon, and British Columbia.

In the fall of '31 I worked out the data on all of the timber holders—principally timber holders in western Oregon, and in the Cascade range from the Columbia River to south of Eugene, on what was a proposed merger. We worked out the company's cruise to compare with the County cruise to try and find a yardstick on which they could agree.

In 1904 under the N.R.A. for the Pacific North-

(Testimony of Norman Porteous.)

west Loggers Association, I made a survey—or under my direction a survey was made of all logging operations in the fire belt of Oregon and Washington. This fire belt consisted of—the survey consisted of a report on their railroads, of the condition of the railroads, their maximum curvature and their maximum grade, a report on the condition of their logging equipment, and also the companies furnished us information on what timber they owned outright and what they had under contract. This survey was used as the basis for the allocation of production of N.R.A.

In 1935 I was employed by the Northern Pacific Railway to go over certain lands which was in their land grant, and make a check cruise, and a preliminary appraisal.

In 1936 I made a report for Mr. Murray of the West Port Logging Company—of the West Port Logging Company's timber, the logging conditions, and their problems that they were up against in logging.

From '37 to '38 we did—or '37 I did odd work.

'38 I did more work for the Northern Pacific, in connection with land grant cases with its cruising.

In '39 and '40 I was employed by the Northern Pacific to make an appraisal for their lands that was [223] in their land grant, that was in their care with the Federal Government. I had with me A. P. LaDue, former superintendent of the St. Paul and Tacoma. We went over their properties. It was over three hundred thousand acres, and we

(Testimony of Norman Porteous.)

worked out—Mr. LaDue worked out his logging cost. We projected our railroads, and I set a value. This work continued till the fall of 1940. The value of these properties was something oven ten million dollars.

In '41, I cruised properties of the Hatten Lumber Company, Milwaukee, Wisconsin. There was two thousand and some acres in British Columbia, Oregon and California. I set a price on that property, and I was then engaged to liquidate these properties under the values I placed on them.

In '42 I went over certain lands in the Olympic National Park, and testified to their value in the Federal Court in Seattle.

In 1943 I took over for the E. K. Wood Company, their timber land in Washington, and looking after five cutting and logging contracts, and I also put a value on their logged-off land and attempted to sell it.

Q. Have you kept any checks or any records in relation to cutting over of lands—the rate of cutting over lands in western Washington, Mr. Porteous?

A. I have.

Q. What sort of a check do you keep, and for what years?

A. I started in 1920—in the spring of 1920. I went to each county seat in western Washington and took off what lands were assessed as timber lands. Then each year following that, from each county in western Washington I took off from the returns made by the land owner whether he was a

(Testimony of Norman Porteous.)

logger or an operator, or just a timber owner, what lands had been logged the year previous. I kept this up until 1932, when I couldn't afford to carry it on any farther, but after that I took the records from the State of Washington Tax Commission, which showed each year, in their annual report that what was assessed as timber lands, so I subtracted that from what was there before. Now, this does not show truly what was logged, because there could have been burned lands, but it does show forest lands from one year to another, and I kept that up until 1939.

Q. Speaking of '39, how much land had been cut over—burned over in Grays Harbor County?

A. The record which I have kept in the twenty-year period from March 1st, 1919, to March 1st, 1939, there was 344,514 acres of logged-off land in Grays Harbor County.

Q. Do you know how many acres there were in Grays Harbor [225] County in 1939 that had standing timber on them?

A. My records show that there was 89,814 acres of privately owned timber lands in Grays Harbor County, as of March 1st, 1939.

Q. Now, have you from time to time had any occasion to check the sales of logged-over lands in western Washington? A. I have.

Q. And what were those occasions?

A. In the spring of 1943, for the Department of Justice, on land in the Tahola Indian Reservation, which had been taken by the Army for a

(Testimony of Norman Porteous.)

munition dump. There was involved there, a question of cut-over lands, and I went over and endeavored to find out in King, Snohomish, and Skagit and Whatcom counties what lands had been sold as logged-off lands with a year or two of that period.

Q. When you were working on the Northern Pacific—you were employed by the Northern Pacific—you were employed by the railroad, weren't you? A. Yes.

Q. The other side was the Government?

A. Yes.

Q. In that case, did you have any occasion to check the sales of cut-over lands? [226]

A. No, although there was burned over timber lands and reproduction, I did not check any sales.

Q. Have you from time to time handled cut-over lands? A. Yes.

Q. And that is for your clients? A. I do.

Q. Do you handle them now? A. Yes.

Q. Have you sold any cut-over lands?

A. Yes.

Q. When did you last make a sale of cut-over land? A. Last Thursday.

Q. How many acres were involved?

A. On that occasion, there was about a thousand acres in all.

Q. Where was the land located?

A. On the South Fork of the Nooksack River in Skagit County.

Q. And what did you do to prepare yourself to

(Testimony of Norman Porteous.)

testify to it, just in this particular case, did you make any inquiries, as to sales of land in the vicinity of the land in question here?

A. Well, I talked to Mr. La Salle and he had taken off sales from—as I understood, from the county records, and I accepted those, and I talked to Mr. Abel about purchases he had made.

Q. And did you examine the property here?

A. I have.

Q. When did you examine it?

A. I was first over these properties in October, 1940. It had nothing to do with this case, but in this case I examined them on September 8th and 9th, 1945.

Q. And what in your opinion is the highest and best use for the property taken here, excluding any need of the United States for the property?

Mr. Metzger: Object as an improper question.

The Court: Objection will be overruled.

A. In my opinion, excluding the Government, the best use of the land was for growing timber.

Q. And have you formed an opinion as to the value of the land taken in this case, as of October 22nd, 1943? A. I have.

Q. And assuming that the land is in the condition it was in when the Government took it over?

A. I have.

Q. What in your opinion was the fair, cash market value of the land condemned herein, on October 21st, 1943?

Mr. Metzger: Object as the witness is not quali-

(Testimony of Norman Porteous.)

Q. And there are some six bridges?

A. Yes.

Q. Did you hear the testimony of the architect put on by the Government, as to the three bridges on Donkey Creek, and the bridge—the Dry Ravine bridge, and the west forks of the Humptulips—that they had five or six years of remaining life in them?

A. I understood that, yes.

Q. But, because of the condition of the bridges you absolutely ignored the fact that this particular land was improved with a logging road?

A. Well, may I answer that in my way?

Q. Yes.

A. Well, the reason I did that was because there was no timber, but, broadly speaking, no timbers to come out over it except the National Forest timber. There wasn't five years of logging in there.

Q. How much timber is there, other than United States Forest Service that might come out over the road, [231] Mr. Porteous?

A. There is a half section of Milwaukee timber. I think it is close to 400 acres lying on the ridge between the two, almost straight east. I believe it is in section twelve. Then within the National Forest, as I—the information which I was able to gather, there is almost a section of which four hundred and some acres is owned by the Polson Logging Company, and 160 acres by Mr. Abel.

Q. That is all the privately owned timber there is?

(Testimony of Norman Porteous.)

A. From the only information that I have been able to find.

Q. Or was, in October of 1943, in that part of the Olympic National Forest which is in the basin of the West Fork of the Humptulips River?

A. That is as far as——

Q. Did you make any investigation to ascertain the facts, Mr. Porteous?

A. I did, in the assessor's office in Montesano.

Q. But, you gave no value whatsoever to this logging railroad because of that substantial section of timber, the Polson Company owns?

A. I have been through that section of timber in 1940, and it was largely a stand of hemlock timber, and from the evidence on the ground, the Polson Logging Company had decided when they pulled out of there, they had [232] taken all of the timber off they could log at a profit, and this other timber—minor species, would not be logged.

Q. How much hemlock would you say that there was?

A. Between hemlock and white fir, seventy-six per cent.

Q. How much timber would you say was on there all together?

A. The only record I have is what I saw in the County.

Q. How much would you say was on it?

A. The county as I remember, showed eleven million feet.

(Testimony of Norman Porteous.)

Q. That is what you had in mind at the time you fixed the fair cash market value?

A. I didn't figure eleven million feet was enough to put in the road and extend beyond the road to reach this timber.

Q. So, it is a fair statement, isn't it, Mr. Porteous, that in arriving at the fair cash market value of the logging road in October 22, 1943, you gave no consideration to any of the timber in the Humptulips Basin lying to the north of the several termini of the road that is under condemnation?

A. Well, the only thing I considered was the land owned by the Polson Logging Company.

Q. And you rejected those as——

A. Yes.

Q. The rest of the land and the timber on those lands, [233] you ignored, and dismissed from consideration? A. Yes, sir.

Q. What consideration if any did you give to the forest—that is, in the—contiguous to the logging road itself that is under condemnation?

A. You mean, the new growth?

Q. Yes.

A. I did not consider it. I considered that growth would be so long in getting so there is any commercial timber there, that it would be way beyond reason to keep up that road just for that timber.

Q. Now, you had some experience with tree farms?

A. No, I know of them, yes, sir.

Q. It is necessary to have roads in there to pro-

(Testimony of Norman Porteous.)

tect those areas from fire, and to administer those forests?

A. Well some. It is two theories on that. Some have a theory you have no roads, and nobody will go in there. You wouldn't have any berry pickers, and wouldn't have anybody. And others have a theory that roads are well to have to travel on in case there is a fire there.

Q. In other words, I gather from that the ideal situation is to have a privately owned road, where you can exclude the campers and berry pickers and fishermen, yet have a means to protect that young growth from fire if it should start in there, isn't that the [234] ideal set-up? A. Yes.

Q. And in administering a re-growth forest of that type, from 10 to 20 years old, it would be careful and prudent, and is the practice in practical operation to have fire control roads in there, isn't it?

A. Yes.

Q. And wouldn't you say that the road that is under condemnation here is more valuable as a fire control and protection road in that area, than it is for growing trees?

A. The reason I did not consider that was the cost of keeping those bridges up. The timbered growth couldn't stand it.

Q. Well, you wouldn't have to keep the bridges up if you were going to use it for fire control purposes?

A. How would you get across the Humptulips?

(Testimony of Norman Porteous.)

Q. You wouldn't have to keep the great big bridge up to get across the Humptulips would you?

A. I didn't look into that. You would have quite aways to go down.

Q. You are going to leave the whole forest on the east side of the Humptulips uprotected because you wouldn't put a bridge across the Humptulips?

A. After the blow down in Clallam County, they wouldn't [235] let anybody in the county at all. They closed all the roads. They didn't try to clear it up. There was less chance of *roads* than keeping the roads up.

Q. They had no trails for getting in?

A. The trails were all blown down. My men that went through had to cut their way through, to get through.

Q. It isn't the policy of the Forest Service to leave lands wholly without roads in—to go in and fight fires? A. I don't know.

Q. You wish to tell this jury the way to reproduce forests is to leave it without roads?

A. That is my idea.

Q. That is the way you would do it?

A. Yes.

Q. No way to get into fight fire at all?

A. So there is no chance for fire to start.

Q. How many years in the particular area down there, will it be from the time that re-growth starts and until pulp from the hemlock on the area would be available for harvest?

A. On an average—that is a hard question to

(Testimony of Norman Porteous.)

answer, because you have got a factor coming in there of fire. Now, anything that I might say would assume that there would not be any fire on that second growth; that it was—nothing was going to interfere with the growth [236] I think that probably it would be to get enough that would make it commercially possible to go in and have men work and make wages, and not run all over the place, it would be about 40 years.

Q. 40 years? A. About 40 years.

Q. Do you know the operation that is going on now down on the Columbia River, on the north side of the River by the Longview Fiber Company where they are cutting second growth fir for pulp purposes? A. I don't know the operations.

Q. The redesign of the plant they made so they could log that in eight-foot logs, do you know how old the fir they are logging for pulp purposes is?

A. No.

Q. You don't know that?

A. I don't know it.

Q. It is necessary, isn't it, Mr. Porteous, in the proper administration of a re-growth forest to go in and thin the forest as it grows? A. No.

Q. It isn't necessary to thin it?

A. No, in this western country nature does that. The forest grows so thick. As it grows up the only way, as nature grows, it grows thick. As those trees grow up [237] those lower limbs are killed off, because they are so thick. As they get a little larger, certain trees die out. That is why we have the beau-

(Testimony of Norman Porteous.)

tiful clear timber in this western country. If you thinned it out, you would have Christmas trees. When the logs got big you would have what they call shallow veneer logs.

Q. Mr. Porteous, isn't it one of the accepted principles of administration of re-growth forests that when that forest reaches the age where the limbs have died off and grown over, that then you go in and cut out that tree that is eventually going to die, and when choked out, and that way save the nourishment in that forest for the tree that is going to grow to maturity? Isn't that one of the basic things in forestry? A. Not that I know of.

Q. Have you ever advised any one in connection with re-forestation?

A. No, I have advised them in connection with cut-over lands, not with re-forestation. I have nothing to do with reforestation. That is, artificial reforestation.

Q. That practice is limited to getting the trees off and selling the logged-off lands? A. Yes.

Q. And you are not concerned over the second crop? [238] A. No.

Q. Now, Mr. Porteous, it is true isn't it that the timber in the Olympic Forest, in the basin of the West Forks of the Humptulips, is the largest accessible stand of old growth timber available to the mills in Aberdeen and Hoquiam?

A. Well, that would depend on whether you decided that nothing in the Wynoochee Valley would come into Aberdeen and Hoquiam.

(Testimony of Norman Porteous.)

Q. And the Wynoochee now is going out to the north, to Puget Sound?

A. That is the way, except Schaffer Brothers are bringing it into Grays Harbor.

Q. And Schaffer Brothers are paying a dollar to go over the railroad of the Simpson Logging Company?

A. I wouldn't know about that. I just know the route of the logs.

Q. But, forgetting now the Wynoochee timber, with the possibility that might come—the timber in the Humptulips is the last available stand of sizeable proportion of old growth, isn't it?

A. Well, the old growth, the species is quite different than what Grays Harbor Mills are used to, because the species there are hemlock, and white fir, with some spruce. [239]

Q. And all of the mills are getting pretty used to change of species, aren't they, whether it is Grays Harbor, or Puget Sound or any where else, they are peeling fir logs, and hemlock logs, and white fir logs now, aren't they?

A. Yes, sir. They are learning how to do it.

Q. But that timber in all probability, over the next generation is going to be sold to loggers, and it is going to come out into the Grays Harbor market?

A. I don't think there is any doubt about that. That is the natural market for it.

Q. And the policy of the Forestry Service is to sell it in larger or smaller tracts to private loggers, and they take it out? A. Yes, sir.

(Testimony of Norman Porteous.)

Q. And if, in October, 1943, you owned this logging railroad—this truck logging railroad that was then being used for that purpose, you would have been pretty satisfied as a business man that if persons acquiring timber to the north would bring that timber out over your logging road, wouldn't you, as long as you were reasonable in your charges?

Mr. Keenan: That is objected to Your Honor. That is injecting——

The Court: I think I would let him answer [240] the question.

A. That is the natural thing to hold that, and get all the traffic will bear.

Q. What the traffic would bear depends on what it would cost somebody else to build another road, wouldn't it?

Mr. Keenan: That is objected to, what the traffic would bear. That would include a lot of consideration, including a cost of condemning.

The Court: Proceed.

Q. You would reasonably expect, wouldn't you, Mr. Porteous, the timber immediately to the north, a dollar and a half a thousand would be a fair charge that you would have been able to obtain for moving it over your road?

Mr. Keenan: That is objected to.

The Court: Objection sustained.

Q. You say you would expect to get what the traffic would bear? A. Yes.

Mr. Blair: I think that is all.

No. 11342

United States
Circuit Court of Appeals
For the Ninth Circuit.

POLSON LOGGING COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record
In Three Volumes
VOLUME III
Pages 529 to 786

Upon Appeal from the District Court of the United States
for the Western District of Washington
Southern Division

FILED
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(Testimony of Norman Porteous.)

Redirect Examination

By Mr. Keenan:

Q. Mr. Porteous, you mentioned 40 years in connection with some tree growth for the area shown on Petitioner's Exhibit 2. What did that 40 year period have to do with? [241]

A. I don't quite understand your question.

Q. Well, in your testimony on cross examination, in talking about the re-growth here, you mentioned a 40 year period.

A. Well, that would be 40 years. There probably would be a growth in which you could take out in the form of cord wood, the pulp species, and in the fir you might get a small piling, but there wouldn't be any heavy stand of timber per acre.

Q. And when is that 40 year date from?

A. From the time that the reproduction starts growing.

Q. In other words, you mean that some of this could come out in 20 years?

A. I saw no evidence that would not be 40 years there, because——

Q. 20 years, I mean, from now?

A. I would say from what I saw of that growth, that it would be 40 years—from 35 to 40 years before you could get pulp timber.

Q. From now? A. From now.

Q. And when would you expect to get some Douglas Fir out of that area?

(Testimony of Norman Porteous.)

A. You mean with that type of logs that are now coming down over the railroads into Grays Harbor?

Q. That is what I mean. Merchantable Douglas Fir. [242]

A. The type of average fir log coming into Grays Harbor today?

Q. Yes.

A. Three hundred and fifty years.

Q. What is the average life of the Douglas Fir logs which they are cutting in the mills in the Grays Harbor now?

A. Well, I would say they would be at least 350 years old, the average tree.

Mr. Keenan: I think that is all.

Recross Examination

By Mr. Blair:

Q. Mr Porteus, you did not want to give the jury the impression that the Douglas Fir re-growth isn't going to be logged until it is 150 years old?

A. I made it distinct. The question was the type of logs that are now coming into the mills at Grays Harbor.

Q. If we were going to get old growth logs?

A. The type of logs coming in today.

Redirect Examination

By Mr. Keenan:

Q. Mr. Porteous, how long do you think it will be before the Douglas Fir on that area can be used as merchantable timber? [243]

(Testimony of Norman Porteous.)

A. Probably in the year Two Thousand, or fifty-five years.

Q. And that assumes a constantly lessening standard, does it? A. Beg pardon?

Q. That assumes a constantly lessening standard?

A. At that time you wouldn't get a high grade to put into lumber. You wouldn't get any clears.

Mr. Keenan: That is all, thank you.

Mr. Blair: Nothing further.

(Witness excused.) [244]

W. H. THOMAS,

produced as a witness on behalf of the Petitioner, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Keenan:

Q. What is your full name, Mr. Thomas?

A. Mr. W. H. Thomas.

Q. And where do you reside?

A. At Portland, Oregon.

Q. What is your occupation?

A. Forest Engineer.

Q. Have you had any academic engineering training? A. Yes.

Q. Where and when?

(Testimony of W. H. Thomas.)

A. I took a civil engineering degree at Stanford University in 1911.

Q. And when did you first go into the woods, become connected with the timber industry?

A. I started in 1902 as a compass man in the Idaho white pine. I worked from 1902 to 1906 running compass—later cruising and sometimes scaling for the saw mill.

Then from 1906 to 1911 I went to college, devoting the summer work to woods experience.

1911 to 1912 I was logging engineer for two [245] logging companies on the lower Columbia River and one in Washington, and one in Oregon.

In 1912—the latter part of 1912—I opened my office in Portland, Oregon, and practiced forest engineering. I continued the practice of forest engineering, my field covering Idaho, Washington, Oregon and British Columbia, until 1918.

In the year 1918 I was in charge of certain work in the spruce woods under the direction of the United States Spruce Division.

In 1919 I returned to private practice. I continued as such until to date, my field being extended to cover, Colorado, New Mexico, California and Louisiana.

Q. Who has retained you—who have you done work for—I should say, involving timber lands, or appraisals, or engineering and so forth, connected with the logging industry?

A. A large percentage of the operating lumber companies on the Pacific Coast, and timber com-

(Testimony of W. H. Thomas.)

panies, a great many underwriting houses, banks, reconstruction finance corporations, the Federal Reserve Bank, Bureau of Internal Revenue and others.

Q. Well, in connection with your work has it been necessary for you to design and consult with others in the design [246] and construction of logging railroads, and logging roads? A. Yes.

Q. And you customarily appraise timber lands, do you not? A. That is a part of my work.

Q. Have you had any experience with cut-over lands? A. I have.

Q. Well, can you tell us briefly what it was, so far as it has any bearing on your qualifications here?

A. Well, the nature of my work for my different clients, we have had occasion to dispose of cut-over lands. Other times to purchase cut-over lands, and in many cases I have had to appraise cut-over lands for different purposes, and consulted recently in the two large sales of cut-over land.

Q. Where were those cut-over lands?

A. Both of them were in Oregon.

Q. Are you familiar with the property involved here? A. I am.

Q. When did you last examine it?

A. September 10th and 11th of 1945.

Q. And were you employed in this Northern Pacific Land Grant case that has been mentioned here before? A. Yes.

Q. On which side?

(Testimony of W. H. Thomas.)

A. The Department of Justice. [247]

Q. And at that time did you have any occasion to check on the sales of cut-over land?

A. A great deal.

Q. Was that in connection with this case?

A. It was.

Q. And were any of the lands that you checked on there in the vicinity of the lands that are involved in this case?

A. Well, we had a considerable area in the upper Humptulips watershed. There was no cut-over lands there involved in this case.

Q. Were you at that time trying to determine land values separate and apart from the timber value? A. We were.

Q. Does that require you to make a check on the value of the lands separate from the timber?

A. Yes.

Q. What in your opinion is the highest and the best use to which this land could be put, excluding the use of the United States Government?

Mr. Metzger: I object, if Your Honor please, as an improperly framed question.

The Court: Well, I think perhaps it is. If you limit it in that form I think I shall sustain your objection. [248]

Q. What, in your opinion, is the highest and the best use of this land, immediately prior to the time the Government took it?

A. For the purpose of growing timber.

Q. And have you made any check on recent—

(Testimony of W. H. Thomas.)

check on values of cut-over timber lands in Grays Harbor County? A. Yes, sir, I have.

Q. Have you formed an opinion as to the fair cash market of these lands in October 22nd, 1943?

A. I have.

Q. What in your opinion was the fair cash market value of the timber—strike that.

What, in your opinion, was the fair cash market value of the lands condemned in this case as of October 22nd, 1943? A. $273.93.

Mr. Keenan: You may cross-examine.

Mr. Metzger: No cross.

Mr. Keenan: That is all.

(Witness excused.)

Mr. Keenan: The Government rests.

The Court: I think as to the witness that preceded this one, wherein you asked the question as to the highest and the best use excluding the uses the [249] Government may put it to, and then there was an objection and the Court overruled the objection. If that witness is here I think he should be called back.

Mr. Keenan: Mr. Porteous, will you take the stand?

NORMAN PORTEOUS

resumed the stand for further examination, and testified as follows:

Direct Examination—(Resumed)

By Mr. Keenan:

The Court: I might say to counsel on both sides I do that because I think it has to be a question of law for the Court.

Q. What, in your opinion, was the highest and the best use of the land which was condemned herein immediately prior to the time the Government took it? A. Growing of forests.

Mr. Keenan: Does that qualify the matter, Your Honor?

The Court: Would his value be the same as when he answered before?

Q. Would your value be the same as when you answered before? A. It Would.

Mr. Keenan: That is all, unless somebody else has a question.

Cross-Examination

By Mr. Blair:

Q. Mr. Porteous, what other uses, other than growing trees was that logging road available for at that time?

A. In my opinion it was not available for any other purpose.

Q. No good for any other purpose? A. No.

Mr. Blair: That is all.

The Court: That is all, Mr. Porteous.

(Testimony of Norman Porteous.)

Mr. Keenan: One question, Mr. Porteous.

Redirect Examination

By Mr. Keenan:

Q. Your last answer does not contemplate that it could not be used for the Federal Government or any of its customers to haul wood products out of the forest, does it?

A. If there was enough timber to warrant the owner of a lot of timber to use it.

Mr. Keenan: That is all.

Mr. Blair: That is all. [251]

(Witness excused.)

The Court: You may proceed with the defense.

Mr. Metzger: Your Honor, please, we would like to make one or two motions directed to the——

The Court: Well, I shall excuse the jury until tomorrow morning at 10:00 o'clock, when you report back. The Court will remain in session, however.

(Whereupon, the jurors retired from the courtroom.)

The Court: Now, you may proceed, Mr. Metzger.

Mr. Metzger: Well, at the conclusion of the Government's case, the respondent, the Polson Logging Company, moves to dismiss the action as to tracts two and three, being the acreage, on the ground that there is no evidence here that the taking is for any authorized purpose, but merely to

(Testimony of Norman Porteous.)

enlarge the boundaries of the Olympic National Forest for the purpose of growing trees there, which is prohibited by statute unless sanctioned by a special act of Congress. [252]

The Court: What do you say to that, Mr. Keenan?

Mr. Keenan: I don't understand that the tracts 2 and 3 were taken by the United States for the purpose of growing trees there. I think they were taken as a part of the road. My understanding—one witness did testify they were taken for the gravel there.

The Court: Well, what was the testimony on that?

Mr. Keenan: That is his only testimony. He was asked what it was taken for, and he said for the gravel. Of course, you need some gravel in connection with road construction. I think that is as far as it goes, and then counsel asked him what part of 2—I believe the ten-acre tract, that they were talking about, and I think Mr. Logan then said, as I recall, "You can find gravel in almost any part of that country," and there is gravel there. It may or may not have been wise on the part of the Secretary of Agriculture, the Administrative official to take that but certainly——

The Court: Well, he certainly cannot take it if he takes it for the purpose of enlarging the forest boundary without authorization. [253]

Mr. Keenan: There is no evidence——

The Court: I wonder is there any evidence the

other way, the Government offered any evidence why this was being taken. There is a roadway of a hundred——

Mr. Keenan (Interrupting): There is no evidence being offered. It is my understanding here the only issue is the issue of valuation.

The Court: No, there is more than issue of valuation because I passed on some phases of this heretofore in passing upon the question as to whether or not the forest boundaries can be extended beyond their exterior limits, and the Court has held, both in reason and based upon the case in the Tenth Circuit, that they can build a highway or acquire a highway, and that it is not an extension, and I am just uncertain about whether there was any evidence of the purpose for which they had acquired these other lands outside of the evidence that was developed on cross-examination.

Mr. Keenan: Not in this case, Your Honor. I did not and neither Mr. Stella, attempted to introduce any. My understanding is, informally from the people in the Forest Service Office in Portland, and my conversation with them there, that this adjoining tracts 2 and 3 were taken in order to get gravel for use on that road. [254]

The Court: Well, but of course that is not in this record, unless it be by that one witness.

Mr. Keenan: He did not put it in, I believe in that fashion. I don't know whether Logan knows that of his own knowledge or not.

Mr. Metzger: As a matter of fact, he said you

could get gravel anywheres, as far as that is concerned.

Mr. Keenan: Cost is always an item in getting gravel.

The Court: There is a substantial block of land here, 100 acres, nearly—almost fifty per cent of the land sought to be acquired, and the burden, I take it, rests upon the Government to show it would be a part of this extended—or this highway that extends from the forest.

Mr. Keenan: I think we can call Mr. Logan to the stand.

The Court: You mean, you want to reopen your case?

Mr. Keenan: If the Court thinks it is necessary. I am of the opinion, that our present hearing here, insofar as the jury is concerned, and one thing and another, is strictly a valuation case. Now, if at this time the Court wants the subject opened [255] that way, we will put Mr. Logan on the stand and ask him if he knows.

The Court: The issues in this case, and as the jury is intelligent men, will consider it is the fact that the Government is acquiring certain acreage of land for the purpose of having a highway which makes a way of ingress and egress to the National Forest, and if they are proposing to acquire—to double their acquisition on the lands—on acreage that are not a part of such highway, and they immediately run counter to the Congressional limitation of the extension of National Forests in the State of Washington.

Mr. Keenan: I understood that portion of Your Honor's remarks. I assume, however, that if these two tracts are taken for gravel purposes in connection with this road, that is maintenance of this road over a period of time, that is for all practical purposes still an extension of the road.

The Court: The question is a very close one. The question of the value of the land is not a major—but I shall permit you to open your case and offer proof, if you can, if it is a part of the highway construction.

Mr. Keenan: May I ask whether Your Honor contemplates opening the case now, or 10:00 o'clock in the morning? [256]

The Court: Do you want to offer evidence of more than the one witness?

Mr. Metzger: The jury has been dismissed.

The Court: That is correct.

Mr. Keenan: I doubt if this is a jury question. I think it is strictly a legal question, or a question to satisfy the Court.

The Court: No, I am inclined to believe that it is a question to be submitted to the jury.

Mr. Metzger: It may have a bearing on the value of the lands, Your Honor.

The Court: Well, I do not know. Of course we cannot anticipate what the respondent is going to offer. It may be one of those unusually splendid gravel pits.

(Arguments continued by counsel.)

The Court: I am going to give you an opportunity in the morning, and grant your motion to

reopen the case and make proof on this issue as to what the object and purpose is of taking these two tracts, that you have labeled 2 and 3, and if it be in connection with the road the Government expects to construct and maintain, I am going to construe it as I did in the argument, as a part of the road system. If it be for the purpose of enlarging the boundaries [257] of the forest, why of course it will have to be excluded as a matter of law.

Mr. Keenan: Very well, Your Honor.

The Court: Now, do you have any other motion, Mr. Metzger, that you had in mind making, and if there is not proof offered as the Court indicated here, of course I will entertain your motion.

Mr. Metzger: Well, I have another motion. I am not quite certain of the propriety—well, on behalf of the respondent Polson, I move that this petition in condemnation be dismissed, because the Government has wholly failed to show, or offer any evidence on the market value of the land being taken for the highest and best purpose for which that land could be used, and for which it was available for use, and for which use it was claimed to be taken. As a matter of law, I believe that the respondent is entitled, and the question here—is the market value of this land considered in the light of the highest and the best use for which it was available or could be available by anybody in the reasonable future, and which the use and purpose would be considered by any third party,

willing purchaser, in a negotiation with a willing seller.

(Whereupon, argument by counsel.)

The Court: I want this very distinctly [258] understood, I do not intend to bind the respondent to the fact that he must limit his proof of what his loss is, by what the acreage value of the land would be if it were a single tract rather than a tract 100 feet wide and 15 miles long, but on the other hand I do hold specifically that he is not entitled to have the jury consider what he might have been able to collect in tolls as the years went by and the Government sold its timber. One reason that I thus hold is that it is a speculative matter. The whole policy of the Forest Service might completely change, but the other is that it is counter to the position that I have taken, and that is still for disposition in the Appellate Court that this is not an extension of the boundaries of the National Forest. If it were it would be an illegal proceeding but it is an opening up of the National Forest to the general public.

Mr. Blair: I can't see the difference.

The Court: Well, it would not be opening it up, if the basis of value were fixed upon a toll, because, if it were left in private hands, then as I said a moment ago the Government would lose whatever that toll was, because whoever bid on that would have to take into consideration that as well as he would the falling of the trees, and the loading of them on trucks, and the [259] haulage and all of those other factors, and he would have to reduce it if he had to

pay toll. We have a different situation here, to separate the things that we can submit to the jury those that should not be submitted to them.

Mr. Blair: Suppose the City, Your Honor, were condemning a bus line here in Tacoma. Certainly, one of the things they ought to pay for, or ought to be considered in arriving at the fair cash market value is the earnings. But yet those earnings are being obtained from the City of Tacoma—the people of the City of Tacoma—the very people who would be condemning the bus line.

The Court: Well, if you have evidence—I am not going to exclude evidence of earnings that you had in the past, within a number of years past, but you are seeking to rest your values upon prospective earnings, that which you may have when the Government sells its timber.

Mr. Blair: Well, Your Honor, I recognize that we cannot take so many dollars and capitalize them, and in that value, get a value. I recognize that, but it does seem to me that an owner—a man who owned it on the date of taking, and the mere fact there was a possibility that the government might condemn [260] of never to reduce the fair market value of anything. That is a fundamental principle of law, that any danger or fear of condemnation should never enter, because presumably he is going to get just compensation.

The Court: Yes, and the converse is true also, the mere fact that the Government may need it for its purposes should not enhance the value. In fact, you will find—I don't think any of the cases

went up after the Brett case; that when Grand Coulee Dam was constructed some six or eight years before, it was constructed, men that had confidence in the future went down and bought the very land upon which the west abutment of the Dam now sits, and all of the lands upon which I think the pump sites, and so forth—I refer to the Continental Land Company case tried in Spokane, and these questions arose there, and the Court instructed the jury that they could not take into consideration, or gain any value by reason of the fact that the Government had in contemplation and was now in the course of construction of the project.

(Argument continued.)

The Court: If it is the Government's position here that this product they have there, they desire to get to the market when it is ripe and ready to go at the best price they can get for it so the [261] receipts thereof can be used to continue their program generally and without an outlet to it or with a private outlet that is subjected to a toll, their purposes are defeated to that extent, and that is the position that this Court has taken, because if the higher Court does not sustain me in that position, then they fall back to the proposition of extending the forest boundaries beyond the limits prohibited by Congressional Law. I have entered into this the colloquy as I appreciate the counsel for respondents are somewhat surprised at the position the Court has taken, and second, I want to fully understand their viewpoint, and have them understand mine, so you can prepare such instruc-

tions as you desire, that I can give or reject, so that you can make your record here, and that is true likewise of the Government. They probably want to make a record, too.

Adjourn Court until 10:00 o'clock tomorrow morning.

(Whereupon, adjournment was taken until 10:00 a.m. November 14, 1945.) [262]

November 14, 1945—10:00 o'clock a.m.

The court met pursuant to adjournment; all parties present except one juror.

The Court: I have been advised by the doctor who is the physician for Juror Number 11, Mr. Fellows, that he has suddenly taken ill; that he will be unable to participate in the trial today and tomorrow, and at the moment he was unable to state whether he would be unable to take part in the trial for some time to come, but his illness is of such a nature that it might require a major surgery, and for that reason I am going to first submit to counsel the permission to stipulate, if you so desire, that we proceed with the trial with eleven jurors.

Mr. Blair: May we have an opportunity to consult our client with respect to that matter, Your Honor?

The Court: Yes. How much time do you want? Do you have any objection on behalf of the Petitioner, Mr. Keenan?

Mr. Keenan: I would like to think it over for five minutes.

The Court: Very well, I will give you ten minutes in which to do that, and I will allow the jurors [263] to be at ease, and you may step out, if you care to, in the hallway.

(Recess.)

Mr. Keenan: The government will stipulate, Your Honor, to proceed with eleven jurors.

Mr. Blair: So far as the Respondent is concerned, Your Honor, we much prefer to have the twelve men decide this case, and we would like to adjourn until Friday or Monday, to determine whether Mr. Fellows does get back in shape where he could participate with the other jurors.

The Court: Well, would you be willing to state what you would do in case he is unable to be back? Of course, if he has to go to surgery with his ailment——

Mr. Blair: We couldn't ever hold this case until his return, if that happened.

The Court: I would not feel warranted in doing that.

Mr. Blair: We would not propose to the Court or request that be done. It would be too long a time to get the case settled.

The Court: But in the event he is unable to be here by Monday, do you stipulate then that we proceed [264] with eleven jurors?

Mr. Blair: Yes, your Honor, we will do that. We will stipulate that if Mr. Fellows does not re-

cuperate to the point where he can serve as a juror, we will go on with the eleven.

The Court: Will you join in that stipulation?

Mr. Keenan: The government will join in the stipulation.

The Court: Let the record so show, and you may bring the jury in.

Might I ask about how long you think the Respondent's case will take, here?

Mr. Blair: We think between a day and a day and a half. We really thought we would finish some time tomorrow morning, perhaps.

The Court: Yes, because this arrangement upsets my whole calendar.

Mr. Blair: A large part of our testimony now will be in the form of offers of proof.

Mr. Keenan: Incidentally, your Honor, I am not sure that I understand the Court's decision so far as tracts 2 and 3 are concerned, and the taking of testimony on that point. When I say I am not sure, I do not understand whether—it is in my own mind, I am not sure what the Court had in mind, if anything more is necessary than [265] a formal showing is necessary to the Court. If that is the case I think we can now dispose of Mr. Logan's testimony on that point, if it is just to the Court.

(Jurors resume their seats.)

The Court: Gentlemen of the jury, the situation that has developed in this case is such that it will have to be continued until Monday morning at 10:00 o'clock. That means that you will be excused, of course, from further attendance on the

Court in connection with this case until Monday morning at 10:00 o'clock.

During the interim between now and Monday, it is exceedingly important that you give high regard to the admonition that the Court gave you at the outset of the case; that is, that you do not discuss it among yourselves or anyone else, or that you permit anyone to talk to you about it. I think the most concise way in which I can put that to you is that you forget that you have anything to do with this case at all, except to remember that you should be back here Monday morning to take it up, so that it can never be said that your decision ultimately rested upon something that you got outside of the court room, and did not hear from the witness stand.

With that admonition I will excuse you, to report back here Monday morning at 10:00 o'clock.

(Whereupon jurors retire from court room.)

The Court: Now as to the Court's position in reference to these other tracts, I have stated upon numerous occasions that if a tract of land of any amount, taken outside the exterior boundaries of a national forest, is being taken for a purpose that enlarges such forest, then it would be taken in violation of existing law, and insofar as that were involved the Court would have to exclude it from the property here involved, because it would be an unlawful taking, and the matter was submitted earlier, and I think some statement was made—I do not think there was any showing made, that it was taken for the purpose of obtaining material for the

construction and maintenance of the highway, but it seems to me that that showing ought to be made in this trial.

Mr. Keenan: Well, your Honor——

The Court: (Continuing): Otherwise I think I might be falling into the error of having the government proceeding on the theory that they were merely taking lands for the growing of trees.

Mr. Keenan: I think we are prepared to make that showing at this time, your Honor, and I might say that after court adjourned last night, I was told by one of the government attorneys that on a previous occasion when the matter was before the Court, the Court made that suggestion it should be made at the time of trial, but it had [267] not been brought to my attention, and had been apparently overlooked by the government.

The Court: Well, upon such a showing being made as to its sufficiency, the Respondent will have to be the judge, so they can make their record, and the Court can then pass upon it, and while the jury is absent, I might state to you that there have been no requested instructions submitted by either side, and of course under the rules when the party rests, they are supposed to submit their instructions if they expect them to be given consideration. The Petitioner announced that they were resting, but I have allowed you to reopen the case, but if you have any special instructions——

Mr. Keenan: We have the instructions, your Honor, in a—let me say half-baked stage now. Frankly, that is where we stand, and I think the

Court in this case can appreciate, possibly, why we are not in a good position to turn in and file instructions at this time. As long as the case has gone over, I would suggest that we be given 48 hours to submit some instructions.

The Court: I will do that. The only instructions that I would like to have from both sides in this case, the Petitioner's and the Respondent's, are instructions touching upon the unusual and pecular facts that exist in this case, as they distinguish it from the ordinary [268] eminent domain proceeding. The usual statement of the principles of law concerning the taking, why, the Court is quite familiar with them, and has given them upon many occasions, but here the government has proceeded upon the theory that the lands they are taking, though it is a strip about thirteen or fourteen miles in length, and a hundred feet wide over and across the property, had no value except the value of growing timber, and that issue I have to submit to the jury, as the contention on the part of the government, as representing the highest and best use. The Respondent of course, has not put on his case, but in argument and matters that have been presented to the Court, his contention is that its primary use is one for a roadway or a truckway, and its potentialities such as would be entitled to consideration, being sufficiently immediate, are for the hauling of timber, not from contiguous lands but from lands that lie generally to the north of this highway, and not only the timber that is privately owned in that region, but likewise the tim-

ber that is held by the government. Am I correct in stating the respective contentions of the parties?

Mr. Metzger: Substantially, those are the different positions.

The Court: And then the Respondent goes farther and states that those potentialities are to be measured by the amount of merchantable timber in this particular watershed that would in all probability move over this particular strip of highway.

Mr. Metzger: I don't know that we go quite that far, your Honor. We say only that the purchaser and the seller were to take that into consideration in arriving at what they think is the fair market value. That block of timber is there, and how much it will enter into it, will enter into the argument——

The Court: That of course is the problem that the Court has, and I take it that a reasonable, prudent owner would ascertain whether or not there was a liability on the part of the government in acquiring this right-of-way, or in concluding that they should acquire it, to pay a toll if they did not acquire it, and of course the purchaser of the timber, if he pays a toll, deducting the price the government gets for its timber, if he knows he has to pay a toll, so if the particular timber purchaser that we have in mind is one who proceeds upon the law as the Court determines it, he would not take into consideration any value that this may have for the purpose of charging a toll to any buyer of the government timber, and I am clear upon my position in that regard, but I am not so clear as to

other timber. There has been evidence that there is other timber ready for market, or about to be marketed, that would go over this road, and in respect to that I say am not so clear. I am of the impression that that could be a factor that a purchaser might take into consideration, particularly here where the evidence now discloses that there is an immediate tract of two hundred acres owned by this particular respondent, and then I think there is another tract that was testified to that is immediately contiguous to this highway just across the line, but it is inside the forest boundary, but privately owned. I want you to give some consideration to that, Mr. Keenan, in the preparation of your requested instructions and authorities that you may have.

Mr. Keenan: Would it inconvenience the Court if we did not submit our requested instructions until Monday morning?

The Court: I do not think so. I do not think it would, because, as far as my problem is concerned, I have simmered the issues down pretty much, except there is this other factor: Assuming, but not deciding now, that no timber, whether it is privately or publicly owned beyond the boundaries or the limits of this highway, and beyond or within the national forest, could be given consideration.

We still have another factor in this case, and that is an established highway grade with bridges upon it, that in January, of 1942, when the first taking occurred, [271] under the first Declaration,

that had value and a grade that had value, and such work as has been put upon it, that had value. That might or might not be a factor to a prospective buyer, and might not be a factor for consideration to a prospective seller, but which it seems to me appropriate to be taken into consideration by the trier of the facts in determining cash market value.

Mr. Metzger: Your Honor, maybe I haven't made some of my position clear. The difficulty of this date that Your Honor is using, as '42, is twofold. First, that taking was of an easement, merely.

The Court: A perpetual easement.

Mr. Metzger: Yes, but the title for certain limited purposes, the title remaining in the Respondent, and secondly, it only covered a portion, not all of what the present Declaration of Taking covers, so that——

The Court: You mean there are some roads that were not included there?

Mr. Metzger: Lots of roads in this that were not in the first Declaration at all, and I have——

The Court: I know there was that error that the Court decided.

Mr. Metzger: Oh, no, but Your Honor please, just to point out, the first Declaration of Taking, which is in the files, was an easement—had no reference to this [272] line at all—didn't cover that in any way, shape or form—did not cover this—did not cover that—nor that, nor that (pointing to map on easel).

The Court: Those are all designated by letters?

Mr. Metzger: They are called "lines," yes. Didn't cover any of these tracts two or three.

The Court: Well, I think you would simplify the issue then if you could enter into a stipulation, if you are in agreement with what counsel for the Respondent say, Mr. Keenan, as to what was covered by the original Declaration of Taking under the easement in 1942.

The testimony here was that there was some thirty or forty thousand dollars that has been spent between '42 and—in early '42 up to '43.

Mr. Metzger: No, no, you are wrong. I think Mr. Keenan will agree that it was all spent after '43.

Mr. Keenan: I don't know the answer to that, but the testimony here, as I recall it, was that approximately $38,000 had been spent to date. Now I don't know exactly what appeared, Your Honor. I did not ascertain that from the witness, and I don't believe that he put it in evidence.

Mr. Blair: As I understand the testimony, [273] Your Honor, I think we are talking largely about nothing, because when the M. & D. Timber Company went in there in '39, they did spend a substantial sum of money on the road, but all of that was spent before 1942. When they went back in 1942, Mr. Abel testified that they dragged the road, which is a maintenance operation, and they spent some money on the bridges, but he thought not over $15,000.00 so that the amount of money spent between '42 and '43 is really immaterial.

Mr. Keenan: There wasn't evidence——

Mr. Blair: That was Mr. Abel.

Mr. Keenan: Mr. Abel isn't testifying to the amount of money spent by the government. Mr. Edge testified to that.

The Court: What I am trying to ascertain, so the jury can make some degree of intelligent appraisal of the property here, what was the situation that prevailed when the government took possession of this property under its easement Declaration, and whatever Mr. Abel had spent or anyone else inured to the benefit of the Respondent, up to that time.

Mr. Keenan: I suggest that it is very easily handled if the questions are asked, what was the value as of October 22, 1943, assuming it was then in the same condition as it was when the government took it. [274]

Now, this property—the character of it and so forth, hasn't changed materially—I think everybody will concede that, from the time that the government's Declaration of Taking was first filed in this Court in February, I believe, of 1942, to date, except for the money spent by the Federal Government.

Mr. Blair: We are not asking for any benefit of any money spent by the government.

Mr. Keenan: I assume that whether the property was taken on February 5th, or whatever the date in February, 1942—or six months after or a year thereafter, does not make any difference at all. It is clear that the witness is speaking of it

as of the time it was actually taken, and valuing it as of October 22, 1943.

The Court: That is why I suggest a stipulation as to those roads where the government—then if any money was spent by the government——

Mr. Metzger: The difficulty is, over my objection you permitted questions to be answered as to the value of the whole, in the condition it was, in February, 1942, and to that I objected—a part of it, the February date being in no event of any——

The Court: Well, the Court was not advised or it overlooked that there were different tracts, and my reason for overruling the objection was I did it on the [275] theory that this entire road structure as outlined, was always included in——

Mr. Metzger: Well, that has been pointed out. I am sorry I was not as explicit as I should have been, but the situation has been gone over so many times that I thought it was in the Court's mind.

Mr. Keenan: I think possibly on one or two occasions I did ask the question as of February. The valuation date in each case was February, but I may have made a mistake.

The Court: I understand from what has occurred there is another matter of great moment to Respondents, and to third parties, that is really a matter of no particular concern to this Court in this case.

Mr. Metzger: That is right.

The Court: The issue as to whether there was a trespass and a liability that might arise in some other suit in the state court is one that the state

court would have to determine from what the Federal Court had done, rather than for this Court to determine, and I do not intend to determine that issue, but I do intend to—or I have found that after the Government took it, that as far as we are here concerned, that taking, whether it was a limited estate or a full estate, placed the government in possession, whether the Secretary of Agriculture [276] acted within his powers or not. I found that he did, and that makes a clear issue that could be presented to an appellate court, but be that as it may, anything that the Government did there by way of the expenditure of public moneys in the interim, upon any part of this highway construction, is to be excluded from fixing a value of it in October of '43.

Mr. Metzger: With all due deference, Your Honor, I must——

The Court: I appreciate the fact that you are not in accord.

Mr. Metzger: When they take only an easement, whatever they got in the way of permanent improvements, inures to the benefit of the fee title.

The Court: Well, it may if the easement is limited in months or years, but this is an easement perpetually.

Mr. Metzger: I think it is true in any event.

The Court: If it was a perpetual easement, I can see very little difference in that and taking the fee, except when they abandoned it, it would inure, but we would have to engage in speculation that there would be an abandonment.

Mr. Metzger: Of course this does not have [277] any bearing on the Court. The Forest Service, Mr. Ira J. Mason, who is now in the Forest Service at Washington, D. C.—I forget just what his position is, testifying before this Court in this cause said: "Of course, if you had taken an easement and built the bridges, at the termination of the easement the bridges and everything else would have passed to whoever the owner of the then fee was?", and his answer was, "Yes, Your Honor." I think that was a question propounded by you.

The Court: It is, the Court asked it himself, but it is purely a matter of law.

Mr. Metzger: I think that is the law, and I think the Forestry Service recognized it.

The Court: I think I was under the impression it was an easement limited in time. This is an easement that was perpetual in its nature, subject to the option of the government.

Mr. Metzger: They could abandon it at any time.

The Court: I am wondering if you can't stipulate and thus simplify some of these matters as to which roads, designating them by similar designations that are involved in this taking of the perpetual easement, and then which additional roads are involved in the [278] taking of the fee under the last Declaration.

Mr. Metzger: Well, at one time I—counsel of course have this record, and Your Honor can——

The Court: Then if you can further stipulate that in the interim between the taking of the ease-

ment and the taking of the fee, that there was no money spent or that there was a fixed amount of money spent?

Mr. Metzger: We might do that.

Mr. Keenan: I think maybe you and I could stipulate.

The Court: This plat you submit, Mr. Metzger, does not seem to show these parts by any letter or figure.

Mr. Metzger: No, that is a copy of the plat attached to the original Declaration of Taking on file—in the file which Your Honor has.

The Court: Do they bear the same designation now, line A for instance, and line B?

Mr. Metzger: Line A and line B—line A goes to here (indicating on the map).

The Court: And line B then——

Mr. Metzger: Then line B goes around to here (indicating).

The Court: And includes all of that?

Mr. Metzger: But it does not include any of the branch lines. [279]

The Court: There is a branch line here.

Mr. Metzger: Well, that branch line is now designated as line G.

The Court: Are there two of them?

Mr. Metzger: There is line H and line I and line J.

The Court: All of which are——

Mr. Metzger: Are new.

The Court: And then the tracts——

Mr. Metzger: Then these two tracts, and this tract (indicating).

The Court: Well, is there a highway going across, under the fee taking, to the left there, from what is designated as line C?

Mr. Metzger: Line C?

The Court: Line C.

Mr. Metzger: Line C goes up part way here, to here, and then line D goes on (indicating).

The Court: Then from line D over across the gravel pits, is that highway, also?

Mr. Metzger: Yes.

The Court: Well, that is not on this map?

Mr. Metzger: No, that is a new take.

The Court: And likewise——

Mr. Metzger: And all this up here is a new [280] take.

The Court: It is unfortunate we had to wait until we got this far in the case before the Court got the full impression of what it was, but the matter is a very involved one by reason of the change of opinion from time to time on the part of the Executive branch of the government in deciding what they would take and what they wouldn't.

Mr. Keenan: As I understand it, Your Honor, the date of valuation was fixed definitely as October 22nd, 1943, and I think in every instance, except possibly one and maybe two—probably one—possibly two. I asked the question assuming it was —the property was in the condition it was when the government took what was the valuation of October 22, 1943. That is what I intended to do.

I suggest that we see if we can work out a stipu-

lation between now and Monday morning, that—I don't think there is any serious——

The Court: While you are not in accord with the Court in some phases of it, nevertheless if you draft your stipulation as to what the actual facts are, that would simplify the submission of the issues to a jury, and then if I am in error on the law, why the Circuit Court can correct me. They seem perfectly willing to do that, and [281] the other matter, I have discussed these new tracts that have come. I was under the impression that they were involved in the January taking of '42, so if you will try to work out some stipulation and submit your requested instructions upon—each upon your own theory of the law——

Mr. Metzger: And if the Government has until Monday, we will have the same privilege as to instructions, Your Honor?

The Court: Yes, you will.

You will be excused in this case until Monday morning.

Mr. Keenan: I have Mr. Logan in the court room, and it was Mr. Logan I intended to use in showing when tracts one, two, and three were taken. If you prefer, I wait until Monday morning——

The Court: The jury are not here.

Mr. Keenan: I was wondering if you thought——

The Court: Yes, possibly you could stipulate that fact.

Mr. Keenan: I think that is going too far, Your Honor.

(Whereupon adjournment was taken until 10:00 o'clock a.m., November 19, 1945.) [282]

November 19, 1945—10:00 o'clock a.m.

The Court met pursuant to adjournment; all parties present.

Mr. Stella: If the Court please, we are prepared to file with the Court the requested instructions of the petitioner. The original request will be filed, and there is a copy for the Court there, and also an original and a copy of a verdict of the petitioner's. At this time request that the original be filed.

The Court: Yes, they may be filed, and then you will hand me a copy of the instructions, and file the original. The rules require, I think, two copies.

Mr. Stella: We will file an additional copy. We have an additional copy.

Mr. Keenan: You have two there, haven't you?

The Court: An original, and a copy.

Mr. Keenan: I gave you three.

Mr. Stella: One for the Respondents and two for the court—two copies for the court.

The Court: I think that is the rule, but one is sufficient for my purposes.

Mr. Blair: I hand the court two copies, and the original to file.

The Court: Now, if there are no further [283] preliminaries, we will proceed with the trial, and I note that we have our Juror back with us, and we are glad that he has recovered sufficiently to take his place in the jury box. Do you have some further proof, Mr. Keenan?

Mr. Keenan: I have, Your Honor. I did rest, and I think that the Court has permitted me to reopen. There are two or three very formal matters.

I am going to have to call six witnesses, but I think it all can be done in about thirty minutes. Call Mr. Edge.

LESTER EDGE,

resumed the stand for further examination, and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Mr. Edge, you testified here the other day that certain improvements had been made on this road and to the bridges by the government, and you testified to the value of—or the amount of money the government had spent on those improvements. Can you tell us whether or not those improvements were made—or made subsequent to October 22, 1943?

A. Yes.

Q. They were all made subsequent? [284]

A. They were made after.

Q. After October 22nd, 1943?

A. Yes, that is actual improvements in place on the road.

Mr. Keenan: You may inquire.

Mr. Metzger: Just a moment. Your Honor, please, in view of this testimony, we move to strike all the previous testimony of this witness regarding improvements as immaterial and irrelevant, and ask that the jury be instructed to wholly disregard the same, the date of valuation being fixed at October 22nd, 1943.

(Testimony of Lester Edge.)

Mr. Keenan: If the Court please, in this case it is shown the amount of improvements here, and the nature of those improvements. It has some bearing on the condition in which the road was at the time it was taken, and some bearing on what was necessary to put the road in condition, and has some bearing on any testimony of the witness as to the value here.

The Court: I think I shall deny the motion at this time, but without prejudice to renew it depending upon the evidence as we go along.

Cross-Examination

By Mr. Metzger:

Q. Mr. Edge, you testified—part of your testimony was to certain monies spent in connection with a fill at [285] O'Brien Creek?

A. That is right.

Q. Is that right? A. That is right.

Q. Did you examine that fill recently?

A. Yes, sir, last Saturday.

Mr. Keenan: If the Court please, that is objected to. I think it is improper cross-examination at this time, and not within the question in chief.

The Court: I don't know just the purpose of what this question and answer is?

Mr. Metzger: If Your Honor please, if this testimony is to be permitted—that it is to stay in the record they spent a lot of money, we have the right, I think, to show that the money was thrown

(Testimony of Lester Edge.)

away; that their fill is washed out, and it isn't any good.

The Court: Objection sustained to your offer of proof. The jury are instructed to disregard the statement of counsel made to the court, not to the jury.

Mr. Metzger: That is right. I want to make a record on that, Your Honor.

Q. Mr. Edge, you examined it last Saturday?

A. That is right.

Q. What condition did you find it? [286]

A. That fill has dropped about ten feet. It is a green fill and it is something that often happens to green heavy fills like that.

Q. What is the condition of the culvert under it?

A. The culvert is in perfect condition.

Q. In perfect condition? A. Yes, sir.

Q. How far down stream has the fill washed?

A. It has not washed down stream at all.

Q. It has not washed down stream at all?

A. No, sir.

Mr. Metzger: That is all.

Mr. Keenan: That is all.

(Witness excused.)

PAUL H. LOGAN,

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Keenan:

Q. Since you last testified in this case——

The Court: Maybe you had better identify him again, Mr. Keenan. Let the record show that Mr. Logan—Mr. Paul Logan is on the witness stand, and he [287] has been previously sworn as a witness in this case.

The Witness: Paul H. Logan.

Q. Mr. Logan, you have previously testified here?

A. I have.

Q. Subsequent to your testifying here the early part of last week, have you examined and checked the records in the Regional Office of the Forest Service in Portland to prepare yourself to testify as to the purpose for which tracts two and three were taken in this case? A. I have.

Q. Do you know what purpose they were taken for? A. The purpose of——

Mr. Metzger: Just a moment, the question can be answered "yes" or "no."

A. Yes.

Q. What was that purpose?

Mr. Metzger: Objected to, Your Honor, as not the best evidence. It is derived from records in——

The Court: Objection will be overruled.

Mr. Metzger: Exception.

(Testimony of Paul H. Logan.)

Q. You may answer the question, Mr. Logan.

A. The tracts two and three were taken for the sole purpose of obtaining gravel there for the further construction and maintenance of roads in the West Fork of the Humptulips area. [288]

Q. That includes any work to be done on this road? A. Yes.

Q. Gravel is to be used on this road?

A. That is right.

Q. You are talking about this case?

A. Yes, sir.

Mr. Keenan: You may cross-examine—pardon, I want to ask a few more questions.

Q. I think you have stated last week that you had examined this property in the fall of 1941, is that right? A. That is right.

Q. Did you examine it at this time?

A. Yes.

Q. And you testified that you had examined these properties several times last summer?

A. That is right.

Q. Was there any—was there any changes in the road, the bridges, or the property in question here between the time you examined the road, the bridges, and the property in the fall of 1941, and the time you first examined the property this summer, except for the improvements made by the Forest Service after October 22nd, '43.

A. I noticed no changes—no difference in the condition of the road. [289]

Q. As you testified to value here—that is you

(Testimony of Paul H. Logan.)

placed a value on the property as of October 22nd, 1943, would there be any change in your valuation figure if you used any other date prior to October 22nd, 1943, and subsequent to January 20th, 1942?

Mr. Metzger: Objected to if Your Honor please, it is an improper question. The testimony is the valuation on October 22nd, 1943. The testimony change in his valuation is immaterial.

The Court: Objection will be overruled. He may answer.

A. The answer to that is no.

Q. Now, Mr. Logan, do you know of any instance in which anyone owning land adjacent to a Forest Service Road, highway, or a trail, that has been prevented from using that road, highway, or trail to gain ingress or egress from his land?

A. I know of no such case.

Mr. Metzger: Objected to, if Your Honor please, as wholly immaterial and irrelevant.

The Court: I shall sustain the objection.

Mr. Metzger: The witness answered. I move to strike it.

The Court: The answer will be stricken and the jury is instructed to disregard it. [290]

Mr. Keenan: I would like to make an offer of proof.

The Court: You desire, Mr. Keenan, to do it later outside of the presence of this jury?

Mr. Keenan: Yes, when the jury is out, and will the Court note an exception to the ruling?

The Court: Yes.

(Testimony of Paul H. Logan.)

Mr. Keenan: You may cross-examine.

Cross Examination

By Mr. Metzger:

Q. Mr. Logan, I think you have testified previously that you made a general survey of this area some time prior to 1941 as to the quality and type of timber there? A. Where?

Q. Well, in this whole area, the National Forest area and surrounding area?

A. The National Forest only, sir.

Q. The National Forest only?

A. Yes, sir.

Mr. Keenan: That is objected to Your Honor.

The Court: Well, the question and answer may stand.

Q. Did you prepare a map on which the findings of your [291] survey were incorporated?

A. I did.

Q. I am handing you a map which is marked Respondents' A-1. Disregarding the coloring on the map, I will ask if that is the map which was prepared by you under your supervision?

Mr. Keenan: It is objected to, Your Honor. It is not within——

The Court: Well, he may answer this question.

A. The answer is yes, my name is on the map—on the blue print.

Q. And on that map, if you will look over in the lower left-hand corner are certain—there is a legend with statements as to the quality and type of timber

(Testimony of Paul H. Logan.)

indicated on the map. Is that the result of your survey? A. It is.

Mr. Keenan: If the Court please, this is objected to as improper cross-examination at this time.

The Court: It is true, it is improper cross-examination but I assume this witness would be asked to stay and recalled.

Mr. Metzger: Your Honor please, it is not cross-examination, I concede, on matters gone into this morning, and so far as necessary I ask leave to reopen [292] the cross-examination as to this witness' testimony when originally called. He testified at some length as to type of timber in all that area, particularly the type of timber upon the lands of this respondent.

The Court: My notes do not show any extensive testimony by this witness on that, but then you may recall him in so far as it is material, you may. I am doing this for the purpose of expediting and saving recalling him.

A. The legend is not the result of my survey, but it is—it is indicatory of what was found. In other words, it is the directive rather than a result.

Q. Well, it is a translation of your findings?

A. That is true.

Q. That is true, and that map is an official product of the Forest Management Division of the United States National Forest, is it not?

A. Yes, it is so typed.

Mr. Metzger: All right, that is all.

Mr. Keenan: The map is not offered at this time?

(Testimony of Paul H. Logan.)

Mr. Metzger: No, I am not offering the map at this time.

Mr. Keenan: That is all, Mr. Logan.

(Witness excused.) [293]

W. H. THOMAS

resumed the stand and testified further as follows:

Direct Examination

By Mr. Keenan:

Q. You are Mr. W. H. Thomas?

A. Yes, sir.

Q. You testified in this case last week, did you?

A. Yes, sir.

Q. And at that time you testified to value?

A. I did.

Q. Would your testimony as to the value of the property taken here by the United States, be any different if you were testifying as to value on any date earlier than October 22nd, 1943, and subsequent to January 20th, 1942?

A. It would be the same.

Q. And your testimony to value was as of October 22nd, 1943? A. Yes.

Mr. Keenan: You may cross examine.

Mr. Metzger: No cross.

(Witness excused.) [294]

H. D. LaSALLE

resumed the stand and testified further as follows:

Direct Examination

By Mr. Keenan:

Q. You are Mr. H. D. La Salle?

A. Yes, sir.

Q. And you testified as to value in this case last week? A. I did.

Q. At that time you testified to the value as of October 22nd, 1943? A. That is correct.

Q. Would your testimony as to value have been any different if you were testifying to any date subsequent to January 20th, 1942, and prior to October 22nd, 1943?

A. It would have been no different.

Mr. Blair: No questions.

Mr. Keenan: That is all, thank you.

(Witness excused.) [295]

W. H. ABEL

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Keenan:

Q. You are Mr. W. H. Abel? A. Yes, sir.

Q. And you testified as to value in this case last week, didn't you? A. I did.

Q. And the value you testified to was as of October 22nd, 1943? A. I so understood it.

(Testimony of W. H. Abel.)

Q. Would your testimony as to value have been any different if you were testifying as to value on any date earlier than on October 22nd, 1943, and subsequent to January 20th, 1942?

A. It would have been slightly lower at any earlier date.

Q. May I ask you, Mr. Abel, if your testimony as to the value on October 22nd, 1943, assumed that the property was in the condition on October 22nd, 1943, that it was between the other two dates that I have mentioned, January the 20th, 1942, and October 22nd, 1943? A. Yes.

Q. In other words, you assumed that the property was—— [296]

A. The property was in the same condition.

Q. The same condition as it was on October 22nd, 1943? A. Yes.

Mr. Keenan: You may cross-examine.

Mr. Blair: No questions.

(Witness excused.)

NORMAN PORTEOUS

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Keenan:

Q. You are Mr. Norman Porteous?

A. Yes, sir.

Q. And you testified as to the value in this case last week? A. I did.

(Testimony of Norman Porteous.)

Q. And your testimony as to value was as of October 22nd, 1943? A. It was.

Q. Would your testimony as to value have been any different if you had been testifying as to value on some date other than October 22nd, 1943, but between or subsequent to January 22nd—January 20th, pardon me, 1942, and prior [297] to October 22nd, 1943? A. No.

Q. There would have been no difference?

A. No difference.

Mr. Keenan: You may cross-examine.

Mr. Blair: No questions.

Mr. Keenan: Thank you, Mr. Porteous.

(Witness excused.)

Mr. Keenan: The government rests, Your Honor.

The Court: You may proceed.

Mr. Metzger: Your Honor please, we now renew our motion to dismiss the petition as to tracts two and three on the ground there is no showing——

Mr. Keenan: If the Court please, if there is any protracted——

The Court: There will be no protracted arguments. Go ahead with your motion.

Mr. Metzger: I move to dismiss the petition as to tracts two and three on the ground there is no showing that the lands are valuable for the uses [298] for which it is now testified they are sought to be taken and there is no authority for the taking of those lands for the purposes which the government testimony alone disclosed they are valuable.

The Court: The motion will be denied and an exception allowed.

Mr. Blair: May it please Your Honor, and counsel, and members of the jury:

It is my privilege at this time to make to you what is known as an opening statement on behalf of the respondents—for the respondents which is Polson Logging Company. As those of you who have served on juries before know, the opening statement is in no sense evidence in this case. It is merely an outline of what we expect to prove by our witnesses, and the purpose of making this is to merely give you an over-all picture of the evidence we expect to put on before the witnesses come on the stand. If I mention any figures or make any statements in the opening statement that is not borne out exactly by what the witness says, then the witness is right and it is merely that my recollection now of what I think he is going to testify to, is wrong. In other words, I just did not remember just exactly what the figure ought to be.

The testimony on behalf of the respondents in this case will show you, as I believe the testimony already [299] has that at the time the government took this property it was land that had been improved, originally in large part as a logging railroad. More than two-thirds of it had been originally a logging railroad. The ties and rails has been removed and the surface dragged and improved as a truck logging road, and at the time the government took this property—the whole of the property except part of tracts two and three, were improved

and were being used as a truck logging road. As to tract two and three, the evidence will show you as I believe it already does, that the truck logging road is across those tracts, but the road itself occupies only a small part of tracts two and three, the other portion of those tracts being improved logged off land.

The testimony will show you that the area through which the roads are located, is logged off land with regrowth from one to thirty years of age, and is what is known as the Polson Tree Farm.

The testimony will show that in the United States there are about eleven million acres incorporated into tree farms, of which about two million acres are located in the states of Oregon and Washington. In Grays Harbor County there are three substantial tree farms, the Clemons Tree Farm owned by the Weyerhaeuser people, Schaffer Tree Farm, and the Polson Tree Farm. The Polson Tree Farm [300] was certified as a tree farm in 1943, and includes about eighty-five thousand acres. Of that area, about twelve thousand acres are contiguous to the road that—the logging road that is being condemned in this proceedings.

The testimony will show that in the operation of a tree farm, it is necessary to spend substantial sums for fire protection. I think the testimony will show in the Clemons Tree Farm for the last three or four years, they have spent substantially in excess of fifty thousand dollars a year in administering and improving that tree farm.

One of the things that is necessary in the proper

administration and operation of a tree farm is roads to provide access to the territory to manage it and to protect that territory against fire. In order to properly and prudently operate a tree farm, it is necessary if those roads are not there, to provide those roads and pay the cost of providing those roads.

In from twenty to twenty-five years from the present time, the evidence will show that there will be timbered tracts available for harvest from the part of the tree farm that is contiguous to the road that is being taken here. Those crops will consist of poles and piling, cord wood for pulp purposes, tie timber and alderwood, and it will be necessary to have a road to remove [301] those timber products from the forest, not only to realize the value of the sale of those timber products, but in the proper and prudent administration of the forest it is necessary to thin those trees from time to time as they get older, because you start with a very large number of trees per acre. If you are going to get a good tree, you have to have them thick, so we will prune out their branches, and those trees you have to destroy and have a smaller number than originally grow when you get your first initial good growth, so you do have to harvest that stuff, and thin it as the tree farm gets older.

The testimony will show that the tree farms—there are three factors determine the value and desirability of a tree farm. One, its accessibility to market. In other words, it is located where the place of the product, when it is finally ready for

harvest, can be gotten readily to market. Second, it is the question of fire protection. Is it an area where the fire hazard is bad, and does it lay so it can't be protected, and the third, is the so-called site quality. In other words, is the ground desirable for growing a new crop of timber. So far as site quality is concerned, regrowth sites are classified into five classes. Type, one, two, three, four and five, type one, being the highest quality and type five [302] the lowest.

The testimony will show this particular portion of the Polson Tree Farm, the twelve thousand acres in the area is all type two, or better. The testimony will further show that the expected growth on type one runs something like fifty thousand dollars—or fifty thousand board feet per acre, as against eight thousand on type five, so there is a very marked difference in the difference between different types of land to produce a regrowth forest.

The testimony will show that there is a very satisfactory regrowth on about ninety percent of the area: that there is about five percent of it was covered by a fire some years ago that has not yet restocked but nature will normally restock it—about three percent of the area that will have to be artifically restocked if it is to grow a new forest.

We will further show you that as of October 22nd, 1943, it would have cost to reproduce new this log-going road, without bridges, the Stevens Creek and O'Brien Creek—ignoring those bridges, it would have cost to reproduce that——

Mr. Keenan: If the Court please, that is objected to. I do not think he should be testifying as to the

cost of reproducing roads at this stage without [303] any foundation laid. I think it is fitting if counsel says they will attempt to introduce evidence along that line, without making figures.

The Court: I think counsel will show what the cost was, rather than figures.

Mr. Blair: We will show you what it would have cost to reproduce new that logging road and the bridges, except the Stevens Creek and O'Brien Creek Bridge. An engineer will tell you that he did not figure the cost of reproducing those two bridges, because in his opinion they were so far gone they had no value in them. He did figure the remaining bridges, and then after getting his estimates of the cost of reproduced new, he went over the entire road, advised himself as to the condition it was in on October 22nd, 1943, and considering its condition then, he determined the amount of money that it would have taken to have cleared out such drains and culverts as needed clearing, to drag and put the surface of the road in condition, to clear out such brush as had grown up along side of the road, and he determined the percent condition of the remaining bridges. I believe he figured there was about twenty percent of the life left in the big bridge across the Humptulips, fifty percent of the life left in the bridge number one on Donkey Creek—that is the first bridge on [304] Donkey Creek, he figured half of the life left. Bridges two and three, he figured they were so far gone he did not allow any value, so he determined the total amount of depreciation —in other words, the amount of money necessary to

put this road back into condition it would have been when it was built, he deducted that from the reproduction figure and arrived at the amount of money necessary to reproduce this road, what the actual accrued depreciation was in the road on October 22nd, 1943.

He will further testify that this road on October 22nd, 1943, was a better and more desirable road than you would have reproduced as of that time, because this road is an old seasoned road, while a road you would produce new, would be what is known as a green road. Furthermore, this road is a road with a fine grade in it. It was built as a logging railroad. It has uniform maximum grades, and low curvature, because it was built as a logging road to —to operate as a logging railroad in the first instance.

The testimony will show you the amount of timber in the area to the north of the area. That is, through which this area operates. In other words, the timber that is in the upper basin of the Humptulips river. The testimony will show you that this road is not the [305] only road, and the route travelled by the road is not the only route that could be travelled to remove that timber. The Public Highway Number 101 which is the Olympic Peninsula Highway runs to the westerly of the road that is under condemnation. It runs through the Olympic National Forest. It is entirely feasible to take a road from north of the township in which the road under condemnation is situated—entirely feasible to run another road from Highway 101 over to this timber to the north.

The testimony will show that it would probably cost more money to build that road than it would to rebuild the road that is under condemnation, and it would cost more to operate over it because it would have upward grades which would increase operating costs, so the witnesses will testify it was reasonable to believe that in all probability that on October 22nd, 1943, that the timber to the north when logged would normally and naturally come out over the road that is being condemned here.

Witnesses will tell you that having considered all of the factors, that in their opinion would have been considered by an owner, willing, but not compelled to sell, and a buyer willing but not compelled to buy, on October 22nd, 1943, that in their opinion the fair cash market value of this property was in the neighborhood [306] of two hundred and fifty thousand dollars on that date, and after having considered all of the factors and all of the issues the highest and best use to which that property was available, that in their opinion, the highest and best use of the property in that case was not for growing trees, but as a truck logging road.

Mr. Metzger: Call Mr. Anderson.

ANDREW ANDERSON

produced as a witness on behalf of the respondents, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. What is your name, Mr. Anderson?

A. Andrew Anderson.

Q. Your age? A. Sixty-eight.

Q. Your profession? A. Surveyor.

Q. Surveyor. You are employed by the Polson Logging Company? A. I am.

Q. And have been how long? [307]

A. About forty-two years.

Q. In what capacity—what has been the nature of your duties with that company?

A. Well, to locate the railroads.

Q. Locate the railroads?

A. And see that they are built, too.

Q. Supervise the construction of them?

A. Partly.

Q. You have been familiar with their railroad construction, and laying out of the railroads during all of that period? A. I have.

Q. In this area—that is to say, if I may do so—when I say in this area, I mean in the vicinity of Township Twenty-one, north range nine west?

A. I am.

Q. Now, Mr. Anderson, did you prepare a map indicating——

(Testimony of Andrew Anderson)

The Court: Has it been marked for identification?

Mr. Metzger: Yes, Your Honor.

Q. (Continuing): Logging railroads, logging railroad grades that were constructed by the Polson Logging Company in Township twenty-one, north range nine west, and partly in the eastern part of the township to the west of there?

A. I have.

Q. Handing you what has been marked for identification as [308] Respondents' Exhibit A-2, is that the map that you prepared? A. It is.

Q. That is from your records as engineer?

A. Yes.

Q. Those railroads were laid out—or those railroad grades, or those railroads were laid out by you?

A. They were all laid out by me and built.

Q. And built by you?

Mr. Metzger: We offer Respondents' Exhibit A-2 for identification, in evidence.

Mr. Keenan: No objection.

The Court: It will be admitted in evidence.

(Whereupon, the map referred to was then received in evidence and marked Respondents' Exhibit A-2.)

Q. Mr. Anderson, this map generally—Exhibit A-2, generally covers the same area as is shown on Petitioner's Exhibit 2, does it not?

A. It does.

Q. And that area also is the same area as is

(Testimony of Andrew Anderson)

indicated—outlined in the red of Petitioner's Exhibit 1? A. It is.

Q. What is the line shown running substantially north and south on the westerly section of the map?

A. The Olympic Highway, and Number 101.

Q. 101, and where does that highway extend?

A. Well, it goes right through to Port Angeles.

Q. Starting where? A. 101 starts——

Q. With respect to Grays Harbor?

A. In Grays Harbor.

Q. Does it start from Aberdeen or Hoquiam, or connect——

A. Aberdeen or Hoquiam? It connects Aberdeen and Hoquiam.

Q. And north of the area depicted or shown by Exhibit A-2, does it go through the National Forest? A. It does.

Q. It follows the same general northerly course through the general area shown here?

A. It does.

Q. And up all the way through the National Forest, is that right?

A. Well, it goes out of the National Forest and into the Indian Reservation and then she comes back into the National Forest.

Q. I see. Now, on this map, Mr. Anderson, have you shown the railroad grades as were originally constructed by Polson Logging Company?

A. I have. [310]

Q. How are they indicated?

(Testimony of Andrew Anderson)

A. By double line, criss cross.

Q. Double line and a cross hatching?

A. And cross hatching.

Q. There is also shown on here the Humptulips River and some creeks?

A. Yes, the West Forks of the Humptulips.

Q. Now, there is shown on—I notice here in Section Seven, Township Twenty-one, North Range Nine West, you show a couple of the lines marked road without any cross hatching. What is that.

A. That is a road built, connecting between the grade in there, the old railroad grade.

Q. In other words, what do you mean, is that an automobile road, suitable for automobile travel?

A. Yes, it is.

Q. Now, you are familiar with the road that the government is seeking to acquire in this case?

A. I am.

Q. On this map, will you indicate how much—what are the railroad grades shown thereon the government is seeking to acquire?

A. It is all——

Q. You have shown no other railroad grades except what they are seeking to acquire? [311]

A. Yes sir.

Q. Could you indicate on this map what they call—the government calls line A.

A. Line A.

The Court: You may step down.

Mr. Metzger: If you desire, you will be permitted to refer to Exhibit A-2.

(Testimony of Andrew Anderson)

A. This is called the line A, in here (indicating).

Q. That line A goes up to the junction just past O'Brien Bridge, is that right?

A. Yes, and then she——

The Court: Speak louder, I don't know whether the jurors can hear.

Q. Then, what?

A. Then it is called the line C from the junction in a northeasterly direction.

Q. Well, will you put in "A" in red pencil at the end of line A?

(Witness does as directed.)

A. That is the end of line A.

Q. Then, as I understand you, and I think there is no dispute, the extension of that line in a northeasterly direction is line "C"?

A. Line "C" up to here (indicating).

Q. Now, line—what they call line C, just put in a "C" at [312] the end in red.

A. That is the end of the road.

Q. Then line D.

(Witness marks on map.)

Q. That is a continuation of what was line C?

A. Line C.

Q. Is that right? Now, you have shown over on the lefthand corner another railroad grade in section—must be in Section 1 of Township Twenty-Tow, North Range Ten West, corresponds to what line on—or is what line on the government map?

(Testimony of Andrew Anderson)

A. Line "F."

Q. Line F. Just make a mark to indicate it. (Witness indicates on map.)

Q. Now, you do not show on this map that this railroad grade, line F connects up with the Olympic Highway, or the Highway Number 101. Is there a connection?

A. Not a railroad grade, but there is a connection with the road built through, shown with the two lines.

Q. I see. There was a connection built prior to October 22nd, 1943? A. It was.

Q. Connecting the Highway Number 101 with this old logging grade? A. It was. [313]

Q. Now, extending through what is marked as tract three and tract two, are there certain grades —roads?

A. This is the road marked with the double line here, between the two railroad grades.

Q. Part of that was an old railroad grade?

A. Yes.

Q. And so indicated on your map?

A. Indicated in Section Nine.

Q. And also in Section Ten, in tract two?

A. Yes.

Mr. Metzger: Just take the witness stand, Mr. Anderson.

Q. Mr. Anderson, I hand you certain photographs marked for identification as Respondents' Exhibits A-3 and 4. Were you present when those pictures were taken? A. I was.

(Testimony of Andrew Anderson)

Q. Do you recognize what is shown in those pictures? A. I do.

Q. Are those pictures of the roads involved in this lawsuit? A. They are.

Q. Are they pictures of the road in the condition in which it was on October 22nd, 1943?

A. They are.

Q. Now, I hand you here also Respondents' Exhibits for [314] identification A-5 to A-10. Were you present when those pictures were taken?

A. I was.

Q. Are they also photographs either of roads being taken in this case or of the general country?

A. Some of them show the general country. Most of these are of the roads.

Q. And they show the condition of the road as it was on October 22nd, 1943? A. They do.

Q. They correctly depict the situation as it then was? A. They do, yes.

Q. There is one more exhibit for identification, A-11, is also a picture. Were you present when that was taken? A. I was.

Q. Do you recognize the area shown therein?

A. I do.

Q. Is that part of the area involved in this lawsuit? A. Well, part of it is.

Q. It shows——

A. It shows partly the road and also the reforestation, and the surroundings.

Mr. Metzger: We offer identifications A-3 to A-10.

(Testimony of Andrew Anderson)

The Court: Any objection? [315]

Mr. Keenan: No objection, Your Honor.

The Court: They will be admitted in evidence.

(Whereupon, pictures referred to were then received in evidence and marked Respondents' Exhibits A-3 to A-10, inclusive.)

Mr. Metzger: If I said A-10, I will make it A-11 to get the correct number.

Mr. Keenan: What is A-11, did the witness tell us?

Mr. Metzger: He will describe it more at length in a minute.

Mr. Keenan: All right.

(Whereupon, picture referred to was then received in evidence and marked Respondents' Exhibit A-11.)

Q. Mr. Anderson, handing you Exhibit A-3, will you mark on Exhibit A-2 where that picture was taken?

A. Right here (indicating and marking on map).

Q. Well, can you tell the jury where it was taken and then mark it to indicate it?

A. It was taken in the northeast quarter of the southwest quarter of Section Thirty-five.

Q. Where with reference to these roads? [316]

A. Looking north, northeast.

Q. How close—was it anywhere near the junction of Highway 101?

A. Right by the Highway 101.

(Testimony of Andrew Anderson)

Q. Just where this road leads off of Highway 101? A. That is correct.

Q. Then, will you mark on A-2—just put A-2 there—A-3 I should say, and as you look at the picture, you are looking——

A. Northeasterly direction.

Q. Down the road that is being taken by the government?

A. Yes, on the road that is being taken, yes. That is the gate across the road.

The Court: It is now time for the morning intermission. As far as the jury are concerned, we will take a recess for fifteen minutes, members of the jury.

(Whereupon, jurors retire from the courtroom.)

The Court: I want to make this suggestion to counsel on these numerous identifications, you will save a good deal of time if the witness, during the intermission, will mark on the plat where A-3 and 4 and 5 is, all the way through.

Mr. Metzger: We will be very happy to do that, Your Honor. [317]

(Recess.)

The Court: Now, you may proceed.

Mr. Metzger: Now, Mr. Anderson, during recess, you have at the suggestion of the Court marked on Exhibit A-2, approximately the places where each of these pictures was taken?

A. I did.

(Testimony of Andrew Anderson)

Q. With an arrow for the most part, indicating the direction in which they were taken, is that right? A. Yes, sir.

Q. Now briefly, Exhibit A-4, was that taken on the road? A. Yes.

Q. And looking along the road?

A. Looking northeasterly direction along the road.

Q. Along the road?

A. It was taken on the northwest quarter of the southwest quarter of Section Thirty.

Q. You have marked it as being taken there, as you say, along the road. You mean, northeasterly? A. Along the railroad grade.

Q. Then, the next picture, Exhibit A-5, was taken along a little farther along the road, is that right?

A. In here. It was taken in northeast—southwest of the [318] northeast, in here, looking along the road on the curve.

Q. Yes, and the next succeeding picture and number Exhibit A-6 was taken in the reverse direction, but at approximately the same location?

A. It was taken on the same curve. That is looking southwest.

Q. I see. The next picture is Exhibit A-7, and is a picture of a bridge. Which bridge is that?

A. That is the bridge crossing the fork of the Humptulips into the southwest of the northwest quarter of Section Twenty-One. It is right in here.

Q. I see.

(Testimony of Andrew Anderson)

A. The picture was taken by looking in a southwesterly direction, right across the bridge.

Q. It shows up the bridge across the picture?

A. Yes, sir.

Q. Now, the picture A-8?

A. A-8 was taken in the southeast of the southeast quarter of Section Nine, looking in a northeasterly direction.

Q. Again looking right along the road?

A. Right along the road.

Q. Now, A-9?

A. A-9 was also taken in the southeast of the southeast of Section Nine.

Q. Looking in which direction?

A. In the northeasterly direction, along the road. [319]

Q. Look at the picture, and——

A. No, it was—it was looking into a northwesterly direction across the country.

Q. Across the country? A. Yes.

Q. Does it show in that picture?

A. It don't show. It shows——

Q. Any other road?

A. It shows this road up here, making the connection.

Q. Well, in other words it shows the road at approximately the place where A-11 was taken?

A. A-11 was taken, yes.

Q. A-10?

A. It was taken in here. A-10 was taken in the

(Testimony of Andrew Anderson)

southwest of the northeast of Section Eleven, looking in a northeasterly direction.

Q. Yes. Now, it shows in that picture—it shows in the foreground——

A. It shows a road we built up to here, which is not on here.

Q. Oh, but is that road shown on Petitioner's—was what line? A. As line "G."

Q. Line G. That is the road that is shown in the background in this picture going diagonally across the hill? [320]

A. Across the hillside.

Q. And the road shown in the immediate foreground, or the center of the picture?

A. The same road.

Q. Which road?

A. The one going diagonally across.

Q. I call your attention, there is one road shown on the background here and another road.

A. It is also showing this part of this road.

Q. Well, then that is part of what you call line B, then? A. Line B.

Q. That is right. Now, Exhibit A-11, that is a longer picture—three pictures in one. That was taken where?

A. One—this one was taken——

Q. When you say this one, you mean the one on the lefthand side? A. Yes.

Q. As you look at it?

A. It was taken about in the—close to this north

(Testimony of Andrew Anderson)

and south center line in Section Seven, and looking east. It shows part of this road in here.

Q. Does it show any part of the National Forest timber?

A. It does. It shows the part of the National Forest timber up here in Section Five, and in Four.

Q. And the hills in the background of that picture, that [321] first section of it, about where would they be?

A. They would be crossing over here.

Q. Well, these——

A. It shows the hills.

The Court: Speak a little louder.

A. It shows the hills coming up through Twelve and Fourteen, and down in through there.

Q. The next picture, the middle section of the picture?

A. It was taken in the same place.

Q. All three were taken in the same place?

A. All three were taken in the same place, except one, you are looking kind of northeast and the other one southeast. The last picture looking southeast, showing the hills down there in Section Twenty-two.

Q. Now, does this picture show anywhere, any of the roads that is being taken or sought to be taken, any one of them?

A. It does. It shows some of this main road here.

Q. Can you indicate on which picture, and where, that line is shown—draw a line down.

(Testimony of Andrew Anderson)

A. On this, or this.

Q. No, on the picture, just with an arrow pointing down from the top. Well, draw a longer line, and mark on it that that indicates whatever section of the road it does.

A. It is this part of the road in there, also. [322]

Q. Take a look at all your pictures?

A. This piece in here—road in Section Nine.

Mr. Metzger: Speak up a little louder.

Q. It shows a part of a road in Section Nine?

A. Part of the road in Section Nine.

Q. All right, just mark on there "road in Section Nine."

Mr. Metzger: Take the witness chair.

Q. Mr. Anderson, as you have indicated on Exhibit A-2, substantially all of the roads from the State Highway 101 to a point in the northeast quarter of Section Eleven, Township Twenty-one, north range nine west, was originally constructed as a logging railroad grade, is that right?

A. That is correct.

Q. What is the general grade or gradient of that road? A. Well, it is a part of——

Mr. Keenan: Pardon, what date are we speaking of?

Q. What date was it when it was constructed?

A. Well, it was——

Mr. Keenan: That is objected to, Your Honor. I understand the date is October 22nd, 1943.

Mr. Metzger: All right.

(Testimony of Andrew Anderson)

The Court: Objection will be overruled. I take it the grade has not been changed very much. [323]

Mr. Metzger: I think it was not changed at all.

A. Part of it was built——

Q. I don't mean the time. What I am trying to ask you, Mr. Anderson, from the point in section northeast quarter of Section 11, which was the end of this railroad grade down to the State Highway, what kind of a grade was it, upgrade, downgrade, level, or what? A. Mostly downgrade.

Q. Mostly downgrade, and what is the gradient?

A. Well, it runs from five-tenths to two per cent.

Q. From five-tenths to two per cent?

A. Uh-huh.

Q. And was there any what we call adverse grade?

A. It was, from the river southwest, was about two thousand feet. That was two per cent grade.

Q. You mean adverse grade? A. Yes, sir.

Q. So that if a railroad train or a railroad logging train was hauling logs out, or a truck was hauling logs out from it—from some—I don't know where, but some point, they would have an uphill grade of two per cent for about two thousand feet in length? A. That is correct. [324]

Q. The rest of the way, it would be downgrade?

A. Downgrade.

Q. With a maximum downgrade of five per cent?

A. Oh, five—five-tenths.

Q. Five-tenths? A. Yes.

(Testimony of Andrew Anderson)

Q. Now, what was the curvature in that road?

A. Well, they were very light. The strongest curve I had in that road was ten degrees.

Q. Ten-degree curve? A. Yes.

Q. And the road was in that condition, and it had that gradient, and that alignment on October 22nd, 1943? A. It did.

Q. Does that apply also to the railroad grade which extends to the north from the O'Brien Creek bridge, or fill, up to—up into the northeast quarter of Section Eight?

A. It does, except that is all downhill grade.

Q. All downgrade? A. Uh-huh.

Q. With the same maximum or minimum curvature? A. Yes.

Q. And the same gradient?

A. Same gradient. [325]

Q. And now, moving over to the railroad grade that you had in Section Twelve, Township Twenty-one, north range nine west, and Section One, of the township to the north, what was——

A. In that grade, there was an adverse grade of one per cent.

Q. But, from the east line of Section One, running to the road, was it downgrade?

A. Half of it—practically half of it.

Q. Was there any adverse grade?

A. One per cent.

Q. One per cent adverse grade for how long?

A. Oh, I should judge about fifteen hundred feet.

(Testimony of Andrew Anderson)

Q. Does an adverse grade of two per cent affect truck logging operations?

A. It does not.

Q. Truck logging operations can operate on much heavier adverse grades than logging railroad operations? A. Oh, yes.

Q. And this—all of these roads were used for logging of this timber by a logging railroad?

A. It was.

Q. That is right. Now, Mr. Anderson, are you familiar with the territory—the ground—the topography and so on north of the south line of the Olympic National [326] Forest? A. I am.

Q. That is, the south line is indicated on Exhibit A-2 by sort of green hatching? A. Yes.

Q. Is that right? A. That is correct.

Q. What is the general contour of that country to the north of this Township Twenty-one north, range nine west? A. Well, it is rolling.

Q. Which way does it slope? A. South.

Q. It slopes south. That is, that the Humptulips River, which is indicated on this map, drains out of that area? A. It drains it all, yes.

Q. And in the main, the area immediately to the north of this Township Twenty-one, nine, is —would you say it was the basin of the Humptulips River?

A. That is correct, the basin of the Humptulips.

Q. There is a sort of ridge of hills. What hills are there?

(Testimony of Andrew Anderson)

A. Well, there is a divide of hills between the east fork and the west fork of the Humptulips.

Q. Yes, and is there any other sort of a divide between the west fork basin and State Highway Number 101? [327]

A. Well, it is continuous, those hills, from there on out to the highway, and also north.

Q. Is the basin—the west fork of the Humptulips ridge, and the timber in there, accessible from Highway Number 101 at a point—at any point north of the south line of the Olympic National Forest?

A. It is.

Q. You have run lines—surveyed lines through there?

A. I have once a day, right through there.

Q. In your judgment as a civil engineer with forty years of experience building roads, it is perfectly feasible to put a road in from the highway, north of the south line of the forest? A. It is.

Q. Is the timber in this west fork basin, which is clearly indicated on the government's Exhibit 1, is that removable over the roads of Polson Logging Company? A. It is.

Q. Could all of it come out that way?

A. It could all come out.

Mr. Keenan: That is objected to, whether it could or not has no bearing on the value of the road.

The Court: No, he has answered the question. Let's proceed, and objection overruled.

Q. Now, you said something about a divide be-

(Testimony of Andrew Anderson)

tween the west [328] fork of the Humptulips and the east fork. Is there timber in the east fork of the Humptulips basin within the National Forest?

A. There is, yes.

Q. Is that accessible from these—what I term the Polson Roads in Township Twenty-one, north?

A. It is, you can get them all in on those roads.

Q. You have also run surveys in there?

A. I have.

Q. Feasible and practical to construct roads in to remove that timber?

A. It is practical to build a road through there.

Q. Now, what would be the condition of any road that might be constructed wholly within the forest?

Mr. Keenan: That is objected to, Your Honor. It has no bearing on this case—of the road in question here, it is outside of the National Forest.

The Court: I do not know what the purpose of it is.

Mr. Metzger: Well, the question is, if Your Honor please, is a question of the availability and the adaptability of these roads. I propose to show——

The Court: Well, the Court has already ruled upon the matter, if I had the same thing in mind [329] as you have, concerning the possibility of using this road and charging a toll upon the removal of the timber from the National Forest, as being an item that is remote and speculative, and contingent on certain events, and not items you

(Testimony of Andrew Anderson)
can take into consideration in fixing the value of this road.

Mr. Metzger: I realize that, but I think, Your Honor, we can, I think, still under your Honor's ruling, show comparative availability and adaptability of roads into the National Forest. That is my purpose.

The Court: I don't know how it would add value or subtract value from it, and that is the only issue the jury has to consider, is what if any loss, or was the loss sustained by the Respondents by reason of the government taking the particular lands here involved. That of course, is in connection with the full fair cash market value, but if your question goes to the utilization of this road by a prospective individual buyer, of the right of way as distinguished from the government's actually taking of the road, with such individual prospective buyers making money out of it, notwithstanding the timber, then the Court would hold it is incompetent.

Mr. Metzger: Do I understand Your Honor has sustained the objection to the question? [330]

The Court: Yes.

Mr. Metzger: I understand the ruling you announced, or the statement Your Honor made last week, exceptions are allowed to all adverse rulings on evidence?

The Court: Yes.

Q. Mr. Anderson, I will ask you this further question: Any road constructed from Highway 101

(Testimony of Andrew Anderson)

at a point north of the south line of the forest, to tap the timber in the Humptulips basin, would have a serious adverse grade for the removal of that timber, would it?

Mr. Keenan: That is objected to, Your Honor.

The Court: Oh, I think I will let him answer.

Mr. Keenan: Well, he is talking about a road within the National Forest now, and comparing it with this road which boils right down to the question of need of the government, again, and I suppose goes to the element of value on the theory that the government needs this particular road.

The Court: The jury in due time will be instructed, and even now the Court will advise them the needs of the government in taking the road is not an element to be considered in fixing the value of the [331] land actually taken, but I am going to let the witness answer this question. I don't know whether he is going to say they could build a road out that way or couldn't.

Mr. Metzger: He already said they could.

Do you remember the question, Mr. Anderson?

A. The question was to the grade, wasn't it?

Q. Yes.

A. Well, there is, going from the highway to the west fork of the Humptulips, is no adverse grade.

Q. No adverse grade?

A. No adverse grade at all.

Q. If that were a new road built in the National Forest? A. In the National Forest, yes.

Q. Well, reverse the picture, if you were remov-

(Testimony of Andrew Anderson)

ing timber from the basin of the west fork of the Humptulips out to the State Highway, or Highway 101, over a road lying wholly within the forest, would you encounter any adverse grades?

Mr. Keenan: That is objected to, Your Honor. We are talking about grades now, within the National Forest, itself.

The Court: Oh, I think I shall let him answer. I am somewhat in doubt as to the materiality of it, because it deals with a situation that might— [332] the government might in the future build such a road, but he may answer.

A. There is no adverse grade to get the timber out of there.

Q. No adverse grade? A. No.

Q. Are you familiar with the timber in the National Forest—I think I have asked you this, immediately north of Township Twenty-one, Nine, and the Township to the west, and the township to the east? A. I am.

Q. About what quantity of timber is there, there, which could be removed over this road?

Mr. Keenan: That is objected to, Your Honor, the amount of timber in the National Forest that could be removed over these roads.

The Court: The objection will be sustained.

Mr. Metzger: The government testified to that in part already, Your Honor.

The Court: I thought you developed that on cross-examination.

Mr. Metzger: No, that was developed——

(Testimony of Andrew Anderson)

The Court: But, it is not an issue. The Court has taken a stand in this matter. It might possibly be—it would be so remote I doubt whether it should even be brought to the consideration of the [333] jury. I think I shall sustain the objection as to the timber that might or might not be hauled over this road.

Mr. Metzger: All right, Your Honor.

The Court: You will have an exception.

Mr. Metzger: An exception, and we would like later, in the absence of the jury, to make further —make an offer of proof from this witness in that respect, for the record. That is all, you may cross-examine.

Cross-Examination

By Mr. Keenan:

Q. Mr. Anderson, is there a C.C.C. Road, or one built by the C.C.C.'s in this township, or the area shown by your map?

Mr. Metzger: Object, Your Honor, please, as immaterial and irrelevant, how any road was constructed, or who by, as long as it was our road at the time of this taking, no matter who constructed it, is immaterial.

The Court: Is it these roads?

Mr. Keenan: I don't know. I am just asking if there is a C.C.C. road in that area.

The Court: Objection will be overruled to this question, you may answer. Just answer yes or no.

A. Yes, sir.

(Testimony of Andrew Anderson)

Q. When was that road built? [334]

A Well, quite a few years ago. I think it was back in around '36, or somewheres there.

Q. And it was built by the United States, was it?

Mr. Metzger: Object, if your Honor, please.

The Court: I am going to sustain the objection, unless you identify it with the road in question.

Q. Will you step down to the easel, Mr. Anderson, and point out that road? A. That is a——

Q. That is a C.C.C. stretch.

A. That is called the CCC, but is from here (indicating), and the next question I don't—I am sorry, I don't understand.

Q. This was built by whom?

A. Either by the National Forest of C.C.C.

Mr. Metzger: I object by whom it was built as immaterial.

The Court: If he will identify the section of the road.

Q. Will you take a crayon or pencil and mark the limits of that?

(The witness does as directed.)

Q. Now, Mr. Anderson, do I understand that just this little [335] piece was built by the government?

Mr. Metzger: Again I object, Your Honor, please, the question by whom it was built is immaterial.

The Court: Objection will be overruled.

Q. What section would this be?

A. Section Seven.

(Testimony of Andrew Anderson)

Q. Would you just write on the sections, there.

A. I have got the sections.

Q. This is Section Seven? A. Yes, sir.

Q. So there is a C.C.C. Road, or at least a road built by the government for fire protection purposes? A. Yes.

Q. On Section—— A. Seven.

Q. What is this section—Oh, I see, in Section Seven, and into a portion of Section Eight, in Township Twenty-one, North Range Nine West?

A. Yes.

Q. And there is another section of road built by the United States through either the Forest Service or C.C.C., as I understand it? A. Yes.

Q. And the northeast of Section Eight, and the northwest of Section Nine, and in the northeast of Section Nine, [336] is that right?

A. That is correct.

Q. And you have indicated that on the map with a red line, which parallels a road?

A. A road, yes.

Q. But, the road that is indicated here in those various sections, is the same road we are now speaking about, that C.C.C. Government Road?

A. Correct.

Q. That road was, I think you can resume the stand, and that road has been used for fire protection purposes right along, hasn't it?

A. It has been used for quite a little travel over it.

Q. And it has been used by both the Forest

(Testimony of Andrew Anderson)

Service and the Polson Logging Company, has it not?

A. Well, not the Polson Logging Company, mostly others.

Q. The Polson Logging Company do anything in this area for fire protection? A. Oh, yes.

Q. What do they do?

A. Well, they look after some—if fire starts, they will go out and try to put it out.

Q. The Forest Service do anything of the kind?

A. The same thing with the Forest Service.

Q. And both the Polson Logging Company and the Forest [337] Service are interested in seeing that no fires start in the Polson Logging Company's land adjacent to the forest, are they not?

Mr. Metzger: Object as not proper cross-examination.

A. They are.

Mr. Keenan: May I see the photographs that were introduced?

The Court: Now, in connection with this question concerning the C.C.C. Road construction, the only way it can have relevancy here, it seems to me, going back to the direct testimony that that road is being taken as a part of a railroad grade, this witness should be asked if that was included in his general answer made on direct examination, there was a railroad grade. He gave the different road grades and their curvatures.

Mr. Metzger: I do not want to make any statement, but part of the question of counsel of the gov-

(Testimony of Andrew Anderson)

ernment relates to a section of the road which is not even involved in this law suit. It is not sought to be taken, and is not being taken.

The Court: I assumed——

Mr. Metzger: The rest of it is all indicated on this map, whether it was a railroad grade or was not [338] a railroad grade. It speaks for itself.

The Court: Is that correct?

Mr. Keenan: Well, it appears on the map, Your Honor, that it was not a railroad grade. I understand the hatching part of the railroad grade, but there is no road being taken in this case, as I understand it, which is not a part of the original grade.

Mr. Metzger: You are not taking any part of that.

Mr. Keenan: How about this (indicating)?

Mr. Metzger: That you are taking, but not any part of this indicating).

Mr. Keenan: All right, that is a C.C.C. testimony.

The Court: Well, that testimony the jury will be instructed, that the testimony in regard to any C.C.C. construction on the highway not involved in this case, is totally irrelevant and immaterial, and should be disregarded by you, as in any way going to fix the value of the property.

Q. Mr. Anderson, is any of that original C.C.C. Road involved in this case?

A. In Section Nine, yes.

Q. It is, in Section Nine? A. And Eight.

Q. And Section Eight? A. Uh-huh.

(Testimony of Andrew Anderson)

Q. The Bailiff, Mr. Anderson, has just handed you the Respondents' Exhibit A-3, I believe it is. Will you refer to the back? A. A-3, yes.

Q. That is a picture, isn't it, of the gate to this road which——

A. In Section thirty-five, yes.

Q. Right at the lower—— A. Yes.

Q. Lower left-hand portion of the map?

A. That is correct.

Q. And that is where it leads off the Public Highway, is it 101? A. 101, yes.

Q. Sometimes called the Olympic Highway, I believe? A. Yes.

Q. And it appears there, that there is some posters that the road is closed, does it not, on the gate?

A. Well, I can't tell you. I haven't read them to tell you whether they say closed or what it says on them.

Q. I notice on the post, which I guess you would call the gate post on your right as you face the gate from the outside, there is a chain. Can you see that chain in [340] the photograph?

A. I do.

Q. What is that for?

A. Well, that is, generally speaking, the Forest Department had that gate locked during the summer.

Q. And for what purpose?

A. I couldn't tell you for what purpose.

Q. You don't know whether it was for forest fires or not? A. No.

(Testimony of Andrew Anderson)

Q. Have you ever gone through that gate?

A. I have.

Q. And how did you get through it?

A. Well, I have gone through when she is open, here lately.

Q. You never had any occasion to open it?

A. No.

Q. And you have never gone there when the gate was locked? A. I have.

Q. How did you get through it then?

A. With another party that had the key.

Q. Who was the other party?

A. Bern Sudderth.

Q. S-u-d-d-e-r-t-h? A. Correct.

Mr. Metzger: Sudderth?

A. Yes, sir. [341]

Q. What is the first name?

A. Borne, B-o-r-n-e.

Q. And who was that gentleman?

A. Well, he is working for the Polson Logging Company.

Q. Polson Logging Company actually had a lock on this gate at all times, too, did they not?

A. I couldn't tell whether they did or not.

Q. Ordinarily, in Grays Harbor County, Mr. Anderson, how many miles of railroad grade do you have to build to log one section of land?

Mr. Metzger: Object to as immaterial.

Q. (Continuing): On the average?

The Court: I think I shall sustain the objection to the question as being too general.

(Testimony of Andrew Anderson)

Mr. Keenan: If the Court please, I think it certainly goes to the witness' qualifications. I think it is proper to find out how much grade it takes to log a section of land.

The Court: The Court has ruled, Mr. Keenan, and you may have an exception.

Q. How many miles of grade have you built for the—located and constructed for the Polson Logging Company—railroad grades?

A. Oh, something over a hundred miles, anyhow.

Q. Something what? [342]

A. Something over a hundred miles, probably a hundred and fifty.

Q. You have located and constructed about a hundred and fifty miles of logging railways?

A. Yes.

Q. That covers how long a period?

A. From 1904.

Q. How many miles of railroad grade do the Polson Logging Company now own and operate?

Mr. Metzger: Object as immaterial.

A. That I can't tell.

The Court: Objection will be overruled.

Mr. Keenan: I am sorry, I did not hear your answer.

A. I say, I couldn't tell you, I didn't add them up.

Q. Do you have any idea?

A. Oh, I should judge about eighty miles.

Q. Why was the rail removed on this road bed?

(Testimony of Andrew Anderson)

Mr. Metzger: Object as not proper cross-examination.

The Court: Overruled.

Q. Why did you remove the rail?

A. Well, we do that on ties—sometimes we remove the steel and ties and use them in another place, and later on re-lay them again in case we go in there. [343]

Q. When did you pick up the steel?

A. 1939, I think we picked that steel up.

Q. Are you sure?

A. Pretty close to it. I wouldn't really swear to it, but it is '39 or '40.

Q. When was this logging railroad built?

A. Well, that commenced in 1916.

Q. And where did you commence, Mr. Anderson?

A. Oh, we commenced in Section Thirty-four, on the main line, not shown there.

Q. Well, where was the first portion of it that is shown here, that you built?

A. From the highway, in——

Q. From the highway in Section Thirty-five?

A. Thirty-five, yes.

Q. In Township Twenty-one ten?

The Court: What year was that?

A. That was in 1916 and '17.

Q. And how far did you build the railroad then?

A. Oh, we built in about—from the road about a mile and a half.

(Testimony of Andrew Anderson)

Q. And when did you build the next piece of railroad?

A. Well, we were building in '18 and '19 and '20.

Q. And you just built continuously in? [344]

A. Yes, as we went ahead with the logging.

Q. As I understand it, then, you built a little railroad in, and you took out the timber that you could that was accessible to that railroad, and then you built a little more railroad into the timber as you went in, you took out the timber, is that right?

A. Took out some timber, that is correct.

Q. You just don't put in a logging railroad, do you, Mr. Anderson, if you were going to log, you wouldn't put in a logging railroad through the whole township at one time, would you?

Mr. Metzger: Object, Your Honor please, it is immaterial and irrelevant.

The Court: I do not know that it has much bearing, but I will let him answer if he knows.

Mr. Keenan: He has answered.

Q. You say you have done it? A. Yes, sir.

Q. That is not the customary way to do it, though, Mr. Anderson? A. No, it is not.

Mr. Metzger: Object, what was customary is not proper here.

The Court: The motion will be granted and the jury instructed to disregard the answer. [345]

Q. When was the next segment of the railroad built? A. We built the last of that in 1936.

(Testimony of Andrew Anderson)

Q. Was this just built in progressive stages, then, from 1916 to '36? A. It was.

Q. As you reached new timber?

A. Well, due to the condition of the timber. Sometimes there was not markets for all kinds of timber.

Q. What timber did you encounter in there that was not marketable?

A. Well, hemlock in them days was not. The hemlock was not much value. It was very low.

Q. What kind of timber predominated in Township Twenty-one, Range Nine West?

A. Well, you go spruce, fir, hemlock, and cedar.

Q. And what did you have the most of, in there?

A. Mostly fir.

Q. How old was that fir that was taken out over that railroad out of Township Twenty-one North, Range Nine west?

A. Well, I couldn't tell you how old the fir was, because I never did count the rings on it to find the age.

Q. Do you know approximately what it was?

A. Well, it might be two hundred—two or three hundred years old.

Q. How many miles of railroad grade do you have in Section [346] Twenty-five?

The Court: Are you about through with this witness, Mr. Keenan?

Mr. Keenan: Yes.

Q. How many miles of railroad grade are there in Section Twenty-five?

(Testimony of Andrew Anderson)

A. In Section Twenty-five, practically between four and five miles of railroad, in Section Twenty-five. You mean, branch lines?

Q. That is branch lines that go in there, too?

A. Yes.

Q. And how about Section Twenty-six?

Mr. Metzger: If Your Honor please, I object as immaterial and irrelevant.

The Court: Objection will be overruled.

Mr. Metzger: Not involving now what they are taking.

The Court: Well, it might or might not have some value to the jury in fixing the total value, as long as you stay within these sections, rather than the whole of the entire holdings.

Q. Can you answer the question?

A. Well, it takes from four to five miles of railroad to log a section of timber.

Q. And are these typical Grays Harbor County sections? [347] A. Yes.

Mr. Keenan: I think that is all.

The Court: Do you have some redirect, Mr. Metzger? It is after lunch time.

Mr. Metzger: I do not believe we have any, Your Honor. The witness can be excused.

The Court: Then, he can step down.

(Witness excused.)

The Court: I think we will try to reconvene at 1:45 this afternoon, instead of 2:00 o'clock, and the jury will be excused until 1:45, and the court will be at recess until then.

(Recess.) [348]

1:45 p.m.

Mr. Metzger: If Your Honor please, my attention was called during noon recess that there was one subject concerning which I did not inquire of Mr. Anderson when he was on the stand.

The Court: You may recall him.

Mr. Metzger: Mr. Anderson.

ANDREW ANDERSON,

resumed the stand for further examination and testified as follows:

Direct Examination

By Mr. Metzger:

Q. Mr. Anderson, exhibit A-2, you have shown that there was constructed through tract 2, a logging railroad grade. That is correct, is it?

A. That is correct.

Q. And that was laid out by you?

A. It was.

Q. In the construction of that road, did you find any gravel on tract 2?

A. Not what you call any good gravel. There is some rocks and red dirt mixed, mostly red dirt.

Q. Any gravel that is suitable for either railroad ballast or road ballast?

A. Not in tract 2.

Q. Not in tract 2. You have since been over that tract, examining it for the purpose of discovering if there is any gravel on it? A. I have.

(Testimony of Andrew Anderson.)

Q. What is the fact?

A. Well, it is too much red dirt, mixed up with more dirt than gravel.

Q. Then, would you say there is or there is not any gravel deposit on tract 2 that is suitable for road ballast? A. No, it is not.

Q. There is not. Now, on tract 3, this 90 acres, you show on exhibit A-2 that there is some railroad grade constructed on there. A. Uh-huh.

Q. Did you find any gravel deposits suitable for road or railroad ballast on tract 3?

A. The only gravel deposit in tract 3 is in the river, where it is any good.

Q. The river is indicated as being in the western part? A. The western part.

Q. And the river actually where it crosses tract 3, is wholly in the northwest quarter of section 9?

A. Section 9, correct.

Q. All right, then, I will ask you the question this way: You have since made an examination of that whole tract, to see whether there is any gravel on it suitable? A. I did.

Q. Is there any gravel suitable for road ballast on that part of tract 3, which is the north half, or represents the north half of the northeast quarter?

A. Not suitable to my opinion, because there is too much dirt in it.

Q. Did you use any of that gravel for your railroad construction? A. No.

Q. And now, this gravel—there, is in the river bed? A. Yes.

(Testimony of Andrew Anderson.)

Q. Where did that come from?

A. That is washed gravel—washed down from the sides, and flowing in there all the time.

Q. In the river? A. Yes.

Q. Is that same gravel found on any government land to the north of there?

A. They can find it in the river bed, yes.

Q. Have you gone up the river? [351]

A. I have been up there.

Q. And there is the same kind of gravel in the National Forest on government land?

A. There is.

Mr. Metzger: That is all.

Cross Examination

By Mr. Keenan:

Q. I understand, Mr. Anderson, that in your opinion there is too much dirt in the gravel on tracts 2 and 3 to make it suitable for road purposes?

A. That is the way I summed it up.

Mr. Keenan: That is all.

Mr. Metzger: That is all.

(Witness excused.)

Mr. Metzger: Call Mr. Forrest.

Your Honor, please, before Mr. Forrest is examined, I would like that the photographs exhibit A-3 to A-11 be submitted to this jury for examination.

The Court: The bailiff will hand them to the first juror, and they will pass them along. [352]

LEN FORREST,

produced as a witness on behalf of the Respondents, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Metzger:

Q. Just state your name. A. Len Forrest.

Q. Are you connected with the Polson Logging Company? A. Yes, sir.

Q. In what capacity?

A. I am a director of the Polson Logging Company, and a department head.

Q. And how long have you been connected with the company?

A. Some 20 years—21, I believe.

Q. 21, and you are familiar with the company's holdings in Grays Harbor County?

A. Yes, I am familiar with them. I have charge of that particular branch of that operation.

Q. The bailiff is handing you what has been marked for identification as Respondents' A-12, will you tell the Court and jury what that is?

A. This is township 21, nine, through which this disputed road passes, plus townships 21, ten, 20 and ten, 20 and nine, showing Polson ownership in that area. [353]

Q. Well now, am I correct in saying that that map shows the township 21, nine, the greater part of which is outlined in red on government's exhibit

(Testimony of Len Forrest.)

1, the township to the west of that, and the two townships south? A. That is correct.

Q. And I notice that a large part of that area on that exhibit, or identification which you hold, is colored in green? A. Yes.

Q. Was that done by you or under your supervision?

A. It was done under my supervision, and I checked it for accuracy.

Q. What is it supposed to represent?

A. It shows Polson ownerships in those four townships.

Q. It shows the Polson ownerships there?

A. On the major question of the Polson tree farm.

Q. Now, you mentioned the Polson tree farm, and that is the major portion of it. Does it cover another area? A. Oh, yes.

Q. An additional area? A. Yes.

Q. Lying which way?

A. It covers two townships over this way (indicating), each way.

Q. That is to the west? [354]

A. To the west, and two—three townships down.

Q. That is to the south?

A. To the south, plus a portion about—this much (indicationg) on the east.

Q. What do you mean by "this much"?

A. About three tiers of sections.

Mr. Metzger: We offer it.

Mr. Keenan: I would like to see it. No objection.

(Testimony of Len Forrest.)

The Court: It will be admitted in evidence.

(Whereupon, map referred to was then received in evidence and marked Respondents' Exhibit A-12.)

Q. Now, Mr. Forrest, referring to Exhibit A-12, the townships are indicated—the two north townships are indicated by their captions on the top of that exhibit, is that correct?

A. That is correct.

Q. So that the township 21 north is substantially the area shown on exhibit A-2, and 21, nine?

A. Yes.

Q. 21, nine? A. Yes, sir.

Q. The red lines sketched in here represent what?

A. They represent the roadways that the government is seeking to acquire here. [355]

Q. Yes, and the green coloring, you already stated represents the Polson Logging Company's ownership?

A. Yes, there is one small patch of Polson controlled—family timber there, or lines there.

Q. That is in a little different shade of green?

A. A little different shade of green.

Q. And roughly speaking, is found over here in section twenty-seven and twenty-eight?

A. And twenty-two.

Q. And twenty-two, and twenty-one, and twenty-two, of this same township, is that right?

A. Yes.

Q. Now, is the main line—logging road of the

(Testimony of Len Forrest.)

Polson Logging Company, indicated on this map or any sections of it?

A. Yes, I believe it is to the west of——

Q. Could you point it out, just in a general direction—just generally where that road runs?

A. It comes into this section down here (indicating), in section 36, travels—this is the main line logging railroad. It goes this way (indicating) and it dodges out of this section, or this township 20 and ten, where this little loop, which is in 20 and eleven, and then it circles north of Humptulips, and then goes on up into the other two townships above, roughly [356] towards Lake Quinault.

Q. That is, it goes on into the National Forest?

A. It goes right through it.

Q. And through the National Forest into the Indian Reservation at Quinalt, the Quinalt Indian Reservation? A. Yes, sir.

Q. And to the south, it runs down where?

A. It runs down within about three miles of Hoquiam on the Hoquiam River, to the dumping ground.

Q. That is the—at tidewater? A. Yes sir.

Q. Where logs are boomed, and rafted to go to mills and market? A. That is right.

Q. Now, Mr. Forrest, in addition to the green coloring here, showing Polson's Logging Company having ownership in section 3, township 21 north range 9 west, and in section 4 of that same township, does Polson Logging Company have other own-

(Testimony of Len Forrest.)

erships within the National Forest,—Olympic National Forest? A. Yes.

Mr. Keenan: That is objected to, Your Honor. I don't know what difference it makes, what other ownerships that Polson Logging Company has in the National Forest. They are not connected. They [357] are not a portion of this parcel. It would be a separate parcel with intervening lands, as far as I can tell from the map.

The Court: I think I will let him answer this question.

A. Yes, we do.

Q. Well, I am not concerned, Mr. Forrest, about any ownerships you might have in the Olympic National Forest. That may be up on the Straits of Juan de Fuca, or the northern part of the Olympic Peninsula, but ownerships, if any, in the Humptulips River watershed.

A. Yes, in township 22, nine.

Mr. Keenan: That is objected to for the same reasons as previously.

The Court: Same ruling, exception allowed.

A. In township 22, nine, which is just north of this 21, nine, the company has part of section 26, 27, 34, 35.

Q. Well, section 34 would be the section immediately north of section 3? A. Yes.

Q. Is that right? A. Yes, that is right.

Q. And the other sections would be another mile north? [358] A. That is correct.

Q. And the timber on those sections would be

(Testimony of Len Forrest.)

accessible by extension of your existing roads into them?

Mr. Keenan: That is objected to, Your Honor.

The Court: I think I shall let him answer it.

A. Yes.

The Court: (Continuing) And overrule the objection.

Q. Now, is there any other timber remaining in this vicinity which is not government owned timber, which is accessible by reason of the Polson Logging Company's road?

Mr. Keenan: That is objected to, Your Honor. That would not add anything to the value of the road unless that timber was owned by the Polson Logging Company, and I understand the question goes to other privately owned timber, which might or might not come out on this road, and if it did, it might be now or it might be 20 years from now. I think it is wholly speculative, so far as it has any bearing on the value of the roads.

The Court: Oh, I am going to let him answer the question. [359]

A. There is other privately owned timber in there.

Q. Where?

A. Part of section 12, Milwaukee timber in 12.

Q. Is that in this same township?

A. 21, nine, yes.

Q. Section 12, is that the correct section? I am now pointing to—— A. Yes.

Q. That is just to the east of the eastern terminus of your existing road?

(Testimony of Len Forrest.)

A. That is right, part of section 13——

The Court: Is that inside the Forest Reservation?

Mr. Metzger: That is outside, Your Honor.

A. Part of section 13.

Q. Beg pardon?

A. Part of section 13 remains unlogged.

Q. That is south of section 12?

A. Yes, sir. That is all in 21, nine, in 22, nine, just above, there is a whole state section remaining unlogged, section 36.

Q. 22, nine, section 36. That would be immediately north of section 1? A. Yes.

Q. That is a whole state section? [360]

Mr. Metzger: All right.

Mr. Keenan: May the record show we have a running objection to that, as I understand the Court's ruling it is not longer necessary to take exception where the question is one of evidence.

The Court: That is right.

A. I am inclined to think that that is practically all of the privately owned timber there, of course, with the exception of what has been sold in the National Forest.

Q. Mr. Forrest, these Polson Logging Company roads, by which I mean those with which we are here concerned, indicated on this exhibit A-12 in red, have they since 1939 been used for the removal of timber by logging trucks?

A. Yes, it was converted shortly after the rails were removed. It was converted into a truck road.

Q. Well, when were the rails removed?

(Testimony of Len Forrest.)

A. The rails—the majority of the rails had been removed by the end of 1937.

Q. Well, what, if any, remained to be removed at that time?

A. As I recall, there was a small portion of the rails still across the crossing, a few hundred feet past the crossing.

Q. What crossing do you mean?

A. Highway 101, on this. [361]

Q. That is, just in the most southwesterly end of the road, with which we are here concerned?

A. That is correct.

Q. Well, they have been used for the removal of timber. What timber has been hauled out?

A. The A. M.——

Mr. Keenan: That is objected to, what timber has gone out before wouldn't make any difference unless you are going to assess the value here on the basis of tolls, which I understand has been ruled out.

The Court: Objection will be overruled.

A. The A. M. Abel timber in 21, nine, was removed.

Q. Well, what timber was that, generally speaking? A. In section 3.

Q. In section 3, to the north?

A. May I look at that?

The Court: Yes.

A. Yes, this timber in here (indicating), 3, some in two.

Q. Well, that is the part of the northeast quarter

(Testimony of Len Forrest.)

of section 3, and the northwest of the northwest of 2? A. Yes.

Q. All right, any other timber? [362]

A. Yes, I think that the A. M. Abel—I know the A. M. Abel timber in the township immediately above 22, nine, was removed at the same time.

Q. That is a full mile or more within the Olympic National Forest? A. Yes.

Q. And that came out over these roads?

A. Over that road, yes.

Q. Well, Mr. Forrest, you heard Mr. Abel's testimony that—to the effect that he acquired from Polson Logging Company the timber, or part of the timber on the southeast of section 3, 21, nine. Was that timber taken out over these roads?

A. Yes, that was taken out over the road.

Q. Any other timber?

A. Yes, part of that Aberdeen, in section 12 here, came out over the road. This piece here (indicating), it is the north—or the south half of the northwest, and the north half of the southwest of 12.

Q. Yes.

A. A portion of that came out over the road, this Milwaukee in the 13, the northwest of 13 came out over the road. Part of this Forest Service timber in two came out over the road.

Q. Which part of two is that southwest quarter of two? [363]

A. I am not too certain of just the exact description of it.

Q. All right.

(Testimony of Len Forrest.)

A. And part of this in 5 and 6 came out over this road, which was also Forest Service.

Q. That was National Forest timber that came out over this road? A. Yes.

Q. As a mater of fact, in the year 1945, has any National Forest timber been taken out over this road?

Mr. Keenan: If the Court please——

The Court: I shall sustain the objection. That is subsequent to the date of taking.

Mr. Metzger: If Your Honor please, I think that the evidence goes to the adaptability of this road for that purpose, regardless of when it was done.

The Court: I do not think there is any issue here, but that the road is adaptable to hauling logs if it is constructed and rebuilt to meet that situation.

Mr. Metzger: Well, the removal of the forest timber is the direct issue, and I think we are entitled——

The Court: Well, the Court has held, Mr. [364] Metzger——

Mr. Metzger: I know you have held that the tolls could not be shown, but the adaptability of this road to remove the National Forest timber, I think it was in—not within Your Honor's ruling. At least, I did not understand that was Your Honor's ruling—that Your Honor's ruling went that far.

The Court: I did not understand there is any issue, but I don't think that will help fix values, but that the road is going to be used in the years to come

(Testimony of Len Forrest.)

for the removal—over which Forest timber will be hauled when sold.

Mr. Metzger: All right.

The Court: You do not contest that issue, do you, Mr. Keenan?

Mr. Keenan: No, we do not contest that, Your Honor.

Q. Mr. Forrest, prior to October 22, 1943, did the Polson Logging Company derive any revenue from the use of these roads in the cutting of logs?

Mr. Keenan: That is objected to, Your Honor, what revenue they derived prior to October 22, 1943, or any other data would have no bearing on the value of the road. It could not be a continuous revenue, because the revenue would have to be from [365] hauling of logs.

The Court: I think I shall let him answer the question, and overrule the objection.

A. Yes, they derived considerable revenue from the use of the road.

Q. Will you tell the Court and jury just what that revenue was.

Mr. Keenan: That is objected to, what that revenue was. Would have no bearing on the value here, and I think the question is clearly incompetent, irrelevant and immaterial. This is not something that they could truck over the road constantly, day in and day out, year in and year out. It will last just as long as the timber lasts. In other words, the question goes straight back to tolls.

(Testimony of Len Forrest.)

The Court: The objection will be overruled and exception allowed.

Q. The question is what revenue did you derive?

A. For the three year period, '41, '42, and '43——

Mr. Keenan: Pardon me, that is objected to here, 1942, the record in this case will show this case was instituted in the latter part of January or the early part of February, 1942. It will have to be the period prior to the institution of the condemnation here.

The Court: I do not know whether it was on this particular section of the road where the perpetual easement was taken in 1941 or '42.

Mr. Keenan: '42.

The Court: October '42?

Mr. Metzger: No, January.

Mr. Keenan: I think the declaration of taking was filed on January 21, 1942.

Mr. Metzger: 21, 22, or 23, I am not sure of the exact date.

The Court: I think I shall hold the testimony prior to the time the government control—there has been numerous statements made in interrogating the witnesses the government seeks to acquire the road. That is not the situation here. The government has acquired this land, and this proceeding is only for the purpose of ascertaining what compensation should be awarded to the Respondents. Under the federal practice, the declaration of taking constitutes the taking, and the title passes.

Mr. Metzger: I don't understand just what Your Honor's ruling is on this question.

(Testimony of Len Forrest.)

The Court: My ruling is that he can testify to anything before the government took the title to the land, any revenue he derived. [367]

Q. What revenue did you derive prior to the government taking title to the land?

A. That would be approximately '41?

Q. '42 and '3. A. '41, '2 and '3?

Mr. Metzger: Yes.

The Court: Isn't it agreed as to the date of the taking, both the perpetual easement and the fee—wasn't the fee taken in this proceeding in October of '43?

Mr. Metzger: Yes.

The Court: And the easement taken, and a part of the land here, in January '42?

Mr. Keenan: That is right.

The Court: Do you limit your question to a particular piece of roadway?

Mr. Metzger: No, I made my question just on Your Honor's statement, the time prior to the taking of title to these lands.

The Court: The witness answered '41, '42, and '43, and you had better make your question as of a given date.

Mr. Metzger: All right.

Q. What revenue did you derive prior to October 22, 1943?

Mr. Keenan: That is objected to, Your [368] Honor. Your date is January 21, 1942.

The Court: It is on a part of the road?

Mr. Keenan: On part of this, at least, the major

(Testimony of Len Forrest.)

portion of it when the government did take the perpetual easement.

The Court: I assume this witness is perfectly familiar with the part that was taken under this perpetual easement, and the part added to that perpetual easement, and it was converted into a fee simple title on the whole of the gross, and I don't know just where this question—let me suggest, Mr. Metzger, if you will put the question to this witness: "Did they take any profits or rentals or tolls or uses on this road—on those parts of this road that the government had taken by easement, subsequent to such taking."

Mr. Metzger: Well, I will try and get at that situation.

Q. Let me ask you this, Mr. Forrest. From whom did the Polson Logging Company derive this revenue?

Mr. Keenan: If the Court please, I object to that question on the broad general ground I stated a few moments ago, that the revenues derived from the use of this road as tolls—that is what this amounts to, are not admissible. I do not like to interrupt [369] counsel constantly, but I would like the record to show that I have a running objection to this complete line of testimony.

The Court. The record so shows, and your objection will be overruled.

Q. From whom did you derive this revenue?

A. The M. D. Timber Company, the J. A. Johnson Logging Company.

(Testimony of Len Forrest.)

Q. Well now, taking the Johnson Logging Company, that was for the revenue for the use of a portion of this road for trucking logs thereover, is that right?

A. Yes, a portion of this road, and a portion of the road that is not condemned here.

Q. That is right. Now, what portion of this road did they use?

A. The J. A. Johnson Logging Company?

Q. Yes.

A. They did some logging in 5 and 6, in here. A portion of it went out this way (indicating). A portion of it came down this way (indicating).

Q. And when did that use occur?

A. The latter part of '42 and the early part of '43.

Q. It was prior to October 22, 1943?

A. Yes, it was prior to that time.

Q. How much revenue did you derive? [370]

Mr. Keenan: That is objected to. It appears that all of this was after the government took a portion of this road, and furthermore, the witness says that it covered the use of a portion of this road, and portions of road not taken.

The Court: That is correct. He does say that it covered part of other roads, and it wouldn't have any value at all, and the Court is now ruling that it is an item to be considered—or it certainly would have to be segregated from the part not connected with this proceeding, and I assume the Respondent is still in control.

(Testimony of Len Forrest.)

Mr. Metzger: Well, Your Honor, I don't know how it is possible to segregate it. Here is a road that was used, none of which was taken. The government didn't have anything to do with it until October 22, 1943. It was used, and revenue was derived from it.

The Court: Well, the witness has answered a part of it is on the road that the government took, and a part of it is on other roads.

Mr. Metzger: That is quite true, but we are entitled to show what revenue—the jury can see from the map how much is not involved in the government's taking, and how much is. [371]

The Court: You will have to make the question clearer, Mr. Metzger.

Q. Mr. Forrest, I understand you that the Johnson Lumber Company or Logging Company used the roads indicated on exhibit A-2 as extending eastwardly from highway 101, and across section 1, and the northern part of section 7, the east part of section 8 and down through section 17 and 20, to the O'Brien Creek bridge, or what was the O'Brien Creek bridge, for the trucking of logs during '42, and the latter part of '43, which is prior to October 22 of that year. What revenue did you derive from such use?

Mr. Keenan: That is objected to, Your Honor. A part of the road that counsel refers to is down on the O'Brien Creek road, or bridge at least was taken, and as I understand, the perpetual easement——

(Testimony of Len Forrest.)

Mr. Metzger: No, none of it was.

Mr. Keenan: Not down to the O'Brien Creek?

Mr. Metzger: No.

The Court: Proceed.

A. There was a portion of that road that you pointed out, Mr. Metzger. That, of course, was not used by the J. A. Johnson Logging Company.

Mr. Metzger: I apologize.

A. (Continuing) Which is that portion that goes over [372] Burnt Hill. That, of course, they did not use.

Q. They did not use that?

A. No, not that high portion through Burnt Hill, but they used this long road down the center here (indicating), and then this access road to highway 101, and section 1 there, and for that use—

Q. Go ahead.

Mr. Keenan: That is objected to, if he is going to say for what use the revenue was given. He is talking about revenue that the Polson Logging Company got in the way of tolls over this road, after the government took the road.

Mr. Metzger: They did not take all of it. They took part of it.

Mr. Keenan: But, he has not segregated. Until it is segregated, I don't think he should be permitted to testify.

The Court: That is correct, I think the witness should—he could be asked the question directly, did they charge tolls or get revenue, or receive any

(Testimony of Len Forrest.)

revenue after the government took any part of these roads.

Q. Well, did you?

A. Yes, we did, for the portion of the road that the government had not taken, and also, of course, when [373] we coudn't charge tolls over a road that the government had already taken.

Q. Let me ask you this, Mr. Forrest. The fact is that in 1942 and 1943, you were paid by the Johnson Logging Company, or Mr. Johnson, for the privilege or the right to truck logs over these roads?

A. That is right.

Q. Some of which—some portions of which the government had filed a declaration of taking, of an easement upon, prior to that time?

A. That is right.

Q. That is right, and you were paid by the Johnson Logging Company for that right?

A. We were.

Q. How much were you paid?

Mr. Keenan: That is objected to, Your Honor.

The Court: Objection will be overruled. He may answer.

A. The amount of timber they took over them, they paid us 40——

Mr. Keenan: That is objected to. He is going to testify to the amount of the toll. It certainly wouldn't have any bearing on the earnings. I think it is going to be based on so much a thousand [374] feet or something of the kind.

(Testimony of Len Forrest.)

Mr. Metzger: That is correct. I asked him how much revenue they derived.

Mr. Keenan: I think he should first ask the basis on which the revenue was fixed.

The Court: You will have a chance to cross examine. Objection overruled.

A. We received $4,375 for the use of that.

Q. Now, Mr. Forrest, did you receive any revenue from the use of any other portions of that road when the United States acquired it, prior to January 21, 1942?

A. Prior to January 21, 1942, yes. In 1941, we received $1,570.13.

Mr. Keenan: That is objected to, Your Honor.

The Court: Objection will be overruled. I understand your objection goes to this whole line of questions.

Q. Any revenue in 1940?

A. In 1940, there was only one or two small items of revenue that was received, but during that time the road had just been recently converted from a logging railroad into a logging truck road, and I think Mr. Abel testified that $12,000 was spent for that purpose. That naturally reflected on the stumpage. [375]

Q. Did you receive any revenue for other portions of this road after January 21, 1943?

A. No.

The Court: You meant '42, didn't you?

Mr. Metzger: '42.

A. After January 1, '42, yes.

(Testimony of Len Forrest.)

Q. What?

Mr. Keenan: That is objected to, Your Honor, because any other portions of this road, I think it should be pointed out which portions.

The Court: Portions which the government had not taken an easement on, I assume.

Mr. Metzger: I don't know what—I am not advised just what this witness' testimony will be on this point.

Q. What portions of the road do you refer to from which this subsequent revenue—subsequent to January 1942 was derived?

A. Well, that was taken over the main portion of the road, up to the end of section 11 there.

Q. Well, in other roads, the road from this—where I am now pointing in section 11, township 21, nine, west, and then down to the highway?

A. Yes.

Q. When was that revenue received? [376]

A. In 1942.

Q. How much did it amount to?

A. $2,100.

Q. $2,100? A. Yes, sir .

Q. Now, Mr. Forrest, I would like to call your attention to some of these pictures. Exhibit A-9 and A-11, I believe. Were you present when those pictures were taken? A. Yes.

Q. Do you know where they were taken?

A. Yes.

Q. Do you know the area as shown therein?

A. Yes, I do.

(Testimony of Len Forrest.)

Q. How were those pictures—that is, exhibits A-9 and A-11 related to each other, if at all?

A. A-9 was taken in the southeast—to the southeast of section nine—21, nine, looking west towards the same spot in which this picture was looking east.

Q. In other words, the two pictures in part are taken in reverse directions and show the same intervening area—show the area intervening between the places where the pictures were respectively taken?

A. That is correct. This picture was taken showing the spot that this picture was taken. In other word, [377] they just crossed.

Q. All right, they just crossed. Well, could you point out to the jury, for example, point out to the jury on exhibit A-9, approximately the place where the picture A-11 was taken? A. Yes.

Mr. Metzger: If the Court will permit, set it down on the stand there.

The Court: Hold the picture up so the 12 jurors can see it. Stand back a little ways or they won't see it.

A. You will notice there is a road going up the side of this hill here. This is the hill that we call Burnt Hill. This road goes up and through, over this hill and down as indicated.

The Court: Now, point it out on the map.

Q. Now, where is that road?

A. This road going up the hill here is this road going up here, and thus out to highway 101, that way, and this goes up and then there is a side road

(Testimony of Len Forrest.)

that goes up to the Burnt Hill Lookout, which is right on top of this hill, here.

Q. That side road is not shown on exhibit A-2?

A. No, it is not shown.

Q. Not involved in this, and the picture—the panorama [378] picture A-11 was taken on the road shown in picture exhibit A-9?

A. Yes, this picture here was taken from right up on this road here (indicating)—this small road going up here. This picture was taken from there.

Q. On the picture exhibit A-11, can you indicate —does that show in turn, the road at or about where the place where exhibit A-9, the picture, was taken?

A. Well, here is the main road (indicating).

Q. The main road is shown—

A. Is shown right through here (indicating). Those little white spots here.

The Court: I think only one or two of the jurors see it.

A. You see this main road in dispute, right up this way (indicating), and this picture——

Q. That is A-9?

A. Is taken from in there, on the road (indicating).

Q. All right, now, on picture exhibit A-11, can you show the jury anything which indicates the south line of the Olympic National Forest?

A. Yes, that is in this timber line here. This is the National Forest timber here, and here is the line. You can see where the old growth of timber is.

Q. The timber there, to the extreme left—on the

(Testimony of Len Forrest.)

left [379] panel of exhibit A-11, is timber in the National Forest, then?

A. This is National Forest timber here.

Q. Mr. Forrest, has the—what do you mean by the Polson Tree Farm?

A. The Polson Tree Farm is about 84,000 acres, of which these four townships are a portion, and this picture shows a part of it.

Q. Well, how was that established as a so-called tree farm?

A. You must have a certificate—apply for a certificate—must meet certain requirements of the association before that certificate is issued to you.

Q. And what in general, what are those requirements?

A. A very careful survey must be made of all the area, to determine what is on the land—what is growing on the land, the type of ground, the site qualities, the fire protection, roads that you may have. That, of course, is a requirement. Your lookouts, whether or not they are available, how much equipment you have to combat a fire with in the event that you would have one, how much control you have over the area as far as ingress or egress is concerned.

Q. Now, when did the Polson Logging Company first apply for a certification of a tree farm? [380]

A. I am not certain when they applied, Mr. Metzger. They started performing this work in the latter part of '40 or the early part of '41.

(Testimony of Len Forrest.)

Q. In other words, you started getting together the data necessary to satisfy the requirements?

A. Yes.

Q. In '40 or '41, is that right?

A. That is correct.

Q. Did you satisfy these requirements and procure a certificate? A. Yes, we did.

Q. When? A. It was in 1944.

Q. 1944.

Mr. Metzger: That is all.

Cross Examination

By Mr. Keenan:

Q. Mr. Forrest, couldn't you have a tree farm without a certificate?

A. You couldn't have it certified as a tree farm under the Association without a certificate, I don't think.

Q. What difference would it make if the tree farm was certified or not certified?

A. I couldn't answer that. I don't know what difference [381] there would be.

Q. Do you know what the values of that certificate are? A. It is very valuable to us.

Q. For what reason?

A. We have a certified tree farm that has a long range planning of the company.

Q. Who did the planning?

A. The Polson Logging Company.

Q. Couldn't the Polson Logging Company do the planning without a certificate?

(Testimony of Len Forrest.)

A. I imagine they could, but they—there are cooperative features, data, fire protection. Even your Forest Service, if you have a tree farm, gives you a certain amount of assistance.

Q. Well actually, the Forest Service would give you all of the assistance they possibly could if you had a fire in your second growth, or your brush adjacent to the National Forest, wouldn't they?

Mr. Metzger: I object, if Your Honor please, as calling for a conclusion of this witness on a matter on which he probably doesn't know?

The Court: Objection will be overruled.

A. What was the question?

(Question read.)

A. I don't know whether they would or not. The policies [382] change so often.

Q. Who issues these certificates?

A. It is a joint committee. It is an American Tree Farm Society, but it is a committee composed of the major operators.

Q. It is the American what?

A. May I see that certificate? I can't remember the name. It is issued by the Joint Committee on Forest Conservation, and they are a member of the American Tree Farms Association.

Q. Is that a government body?

A. No, sir.

Q. Just what do you do, Mr. Forrest, when you set out to have a tree farm?

A. As I mentioned before, one of the things you have to do is map your area, show your ownerships.

(Testimony of Len Forrest.)

It must be well blocked, or otherwise you wouldn't have an control over it. You must show that your land is suitable for growing a new crop of timber. You must have maps showing your fire history in the area. You must have all of that data.

Q. Do you have to plant any trees?

A. You mean, do you have to?

Q. Yes, if you have a farm.

A. Conditions vary on that. We have planted experimentally, [383] a considerable amount of Port Orford cedar in this area. We wanted some redwood, and we have planted other species, too, experimentally. Most of this area is in the West Coast growing area, on a good site, which re-seeds itself naturally very well, and we have a very excellent re-growth.

Q. How many acres did you plant?

A. I wouldn't be able to answer that, Mr. Keenan.

Q. Do you know where they are located in this forest? A. Just in a general way.

Q. Some of them in this township?

A. Yes, sid.

Q. I am talking about—— A. 21-nine.

Q. 21.

A. Nine. There is, but I would just be able to point it out to you generally.

Q. How many men do you have employed farming on this tree farm?

A. Farming—you mean foresters?

Q. Well, I suppose you have farmers on a farm.

(Testimony of Len Forrest.)

A. Tree farmers or just foresters?

Q. Just foresters. How many men do you actually have working then on this tree farm—I mean, on the ground. [384]

A. You mean patrolling the area? I don't quite understand your question.

Q. How many men does it take to run a tree farm that has approximately 84,000 acres in it, then?

A. How many men it would take to run it?

Q. Yes, patrol it.

A. I don't know what they do on it. During the fire season you must have—I think we normally, outside of our connections with the Forest Fire Association, we normally have three to four watchmen. All they do is patrol these gates and these access roads to keep berry pickers and so forth out. We have our usual foresters, and during the winter months, when these patrolmen are not needed for patrolling for fire at the access roads, we normally help the forester.

Q. What does the forester do?

A. I couldn't really explain it. I am not a forester myself, and sometimes I have often wondered.

Q. Now, if you had 84,000 acres of timberland, or any timberland, you would be patrolling that too, for fires, wouldn't you?

A. We had 84,000 acres of timber.

Q. Or any other amount?

A. We wouldn't have to patrol it as extensively as the growing of it, because naturally the timber-

(Testimony of Len Forrest.)

lands, if [385] this was all timber, you wouldn't have the access roads to it. You wouldn't have these long access roads through the growing area.

Q. Which do you refer to as the access roads?

A. Well, this red on there, was one of our access roads. We have other access roads in 21, nine. You must have them in growing areas.

Q. Now, assume that you did not have a certificate that this was a tree farm, would you still patrol it? A. Yes, I imagine we would.

Q. You would do just the same things, wouldn't you, whether you called it a tree farm or called it second growth timberland?

A. No, you would not. There is requirements that you have to live up to, to keep this.

Q. Do you save anything on taxes by having that certificate? A. No, sir.

Q. Do you get anything more for what comes off the land, because you have got the certificate?

A. No, not that I know of.

Q. As a matter of fact, every cutover section of land in Grays Harbor County has got either some railroad or railroad grade, or some old truck road in it, isn't that right?

A. I wouldn't be able to answer that. [386]

Q. Well, isn't it a fact that practically every section which has been logged over in Grays Harbor County has an abandoned railroad grade in it?

Mr. Metzger: Object as immaterial and irrelevant.

The Court: Objection overruled.

A. As a matter of fact, I am not very familiar

(Testimony of Len Forrest.)

with the western Grays Harbor County, other than our own holdings.

Q. What is the fact, Mr. Forrest, as to whether or not the greater portion of timber in Grays Harbor County has been removed?

Mr. Metzger: Object as immaterial and irrelevant.

The Court: I don't quite see the relevancy of the question. You mean, privately held timber?

Mr. Keenan: That is what I mean, Your Honor.

The Court: Oh, he may answer it.

A. I don't know. Well, there is a considerable amount of privately owned timber in Grays Harbor County yet there. We have a considerable amount.

Q. Hasn't the major portion of it been removed?

A. The major portion of the county?

Q. Of the privately owned timber in the county.

A. Well, I rather imagine the major portion, which percentage or anything I wouldn't know.

Q. How is the majority of that timber removed?

Mr. Metzger: Object as immaterial and irrelevant.

The Court: Objection will be overruled.

A. How was it removed?

Q. How was it removed?

A. I imagine your question applies to means or methods of transportation?

Q. That is right, truck or logging railroad.

A. Oh, in the early days a great deal of the timber was splashed down the rivers, and then we went into railroad logging, and a great deal of it was re-

(Testimony of Len Forrest.)

moved by rail. Then, in later years, why more and more we have moved towards truck logging, and removing it by truck roads.

Q. The majority of the timber has been removed by logging railroads, has it not?

Mr. Metzger: Object, Your Honor please. It is immaterial. Times have changed, so how it has been done in the past——

The Court: Objection will be overruled. He may answer.

A. Well, I would be limited to practically my own bailiwick here, the majority of ours has been removed by logging [388] railroad. I don't know what percentage in the county has been removed by rail or splashed, or by truck. I wouldn't know.

Q. Ordinarily, after the timber is removed, the steel is torn up, isn't it, and what ties were taken up are taken, and the grade is really abandoned, isn't that true?

Mr. Metzger: Object, Your Honor please.

The Court: Objection will be overruled.

A. Where there is no further use for the road, the steel is removed—the ties are removed, and——

Q. Now, who owns section 16 in township 21 north range nine west, Mr. Forrest?

A. Who owns it?

Q. That is right? A. State of Washington.

Q. And there is this road that has been taken, goes across section 16, doesn't it?

A. That is right.

Q. And who has the right-of-way there?

(Testimony of Len Forrest.)

A. Polson Logging Company.

Q. Are you sure it isn't the Ozette Railroad Company? A. I am certain of it.

Q. How did the Polson Logging Company get it?

A. From the Ozette Railway. [389]

Q. Where did the Ozette get it?

A. From the State of Washington.

Q. When does it expire?

A. 1948, I believe. I would have to look to be sure. I may be wrong on that date.

Q. Now, when you started on this tree farm, then as I understand, it was in 1940?

A. Either the latter part of '40 or the early part of '41.

Q. What did you do in 1940 to start it?

A. The first thing they had to do was map the whole area. Then, typed the whole area with maps, of course—made duplicate maps of all this area—the tree farm area, and put in different age groups, and so forth, of the new timber—showed the fire areas, and had to map all of these access roads—had to list all of our equipment, and we constructed, I think, one more fire tower to please them. All of that had to be done.

Q. Where did you construct the fire tower?

A. It was over on McElfey Hill. I don't know whether I can exactly point that one out. It is over in 21, ten, here (indicating).

Q. It is not anywhere on the land which this—it isn't in 21, nine, then?

A. No, the fire tower is in section 7.

(Testimony of Len Forrest.)

Q. When was it put up? [390]

A. I can't remember the date. That has been a long while.

Q. Who put it up? A. Who put it up?

Q. Yes.

A. I don't know whether the Forest Service built it or not. We furnished the timber, or we furnished the material for it, and I don't know whether they built it or not. I believe they built the road to it. We furnished the land, the ground, and the necessary equipment.

Q. I believe you said you were present when pictures A-9 and A-11 were taken?

A. Yes, sir, I was.

Q. When were they taken—what was the date?

A. May I see those pictures?

Q. Do you know approximately what month it was, and year?

A. I would have to look. This year. They apparently are not dated. They were taken either August or September of this year.

Q. Now, I think Mr. Forrest, that you testified that the Polson Logging Company owns some land within the border of the National Forest and immediately north of 21, nine, is that right?

A. Correct.

Q. And where would they be—what were the sections?

A. 26, 27, just a part of them, and 34, and 35.

Q. And did you also testify that the timber there would come out over this road?

(Testimony of Len Forrest.)

A. Yes, yes it would come out, or should.

Q. Pardon me? A. I added "or should."

Q. There is intervening forest lands between this road and those timbered portions of the sections, is there not? A. Yes, that is right.

Q. And you contemplated it would come out over these forest lands?

A. They would have to come over that way.

Q. Did you contemplate having any trouble in getting a permit?

A. After what has happened in this case, I am not sure.

A. All right, you are operating over forest lands now? A. The railroad is, yes.

Q. I mean, Polson Logging Company's railroads? A. Yes.

Q. And under permit? A. Yes.

Q. And you did not contemplate there would be any permit to go over forest lands here, did you, as to those parcels? A. Up above there? [392]

Q. Yes. A. No, I don't think so.

Q. Would you class the National Forest as tree farms? A. Would I what?

Q. Would you classify one of the National Forests as a tree farm? This one, for instance.

A. This National Forest?

Q. Yes.

A. No, it is all an old growth area, although within our tree farm we have a portion of the National Forest within——

Q. Well, actually there is some cutting contracts

(Testimony of Len Forrest.)

in the National Forest, are there not? What do we mean by a "cutting contract"?

A. Well, that is—a cutting contract is where a man is given the right at so much per thousand to go in and remove the timber.

Q. The Schaffer Brothers are cutting in the National Forest, aren't they?

A. Yes, sir, that is way up the other side. I am not very familiar with their setup.

Q. You have been up to their operation?

A. No, I haven't been there.

Q. Do you know how long the contract runs for?

A. I haven't any idea. [393]

Q. The Simpson Logging Company has a large cutting contract in the Olympic National Forest, have they not?

A. I don't know that either. I am not familiar with either of those operations.

Q. Haven't you heard them discussed in the Harbor?

A. I have heard them discussed, but I am not familiar with them.

Q. Do you understand that selective cutting is done whenever there is any cutting of timber in the National Forest?

A. Sometimes, and I think the Forest Service will bear me out on this: Sometimes it is practical to do selective logging. Sometimes it is entirely impractical. Sometimes it is more practical to take all of the timber and let the new growth come in, but there is different opinions on that.

(Testimony of Len Forrest.)

Q. There is two things, you can clear-cut, as I understand, or you can have selective logging?

A. Yes, depending upon the condition, the nature of the ground and all of that sort of thing enters into it.

Q. Now, actually when it is practical to do so, doesn't the National Forest require anybody cutting in there to so cut that the land will re-seed, and they will get another crop of timber in the shortest possible time? [394]

Mr. Metzger: If Your Honor please, I object as immaterial and irrelevant—argumentative.

The Court: I am rather inclined to believe it is. I shall sustain the objection.

Q. Do you own any land in Township 21, nine, yourself, Mr. Forrest?

A. Yes, I have an undivided one-half of some of the Polson land down there.

Q. And you and Mr. Polson are in on that?

A. Yes, tree farm growing land.

Q. Well, you have got a tree farm there too, then?

A. No, it is a part of this one.

Q. Well then, this tree farm isn't all owned by the Polson Logging Company?

A. It is just controlled by them.

Q. Controlled by them?

A. Yes, the area that has been certified as a tree farm is controlled by the Polson Logging Company.

Q. Now, who converted this grade—this railroad grade to a truck, or to a—yes, truck road?

(Testimony of Len Forrest.)

The Metzger: Object as immaterial and irrelevant.

The Court: Objection will be overruled.

A. It was converted by the M. and D. Timber Company, is one of the considerations for the removal and granting [395] of this contract to remove from some of the lands they had acquired in the north of 21, nine.

Q. Was there any timber taken out of the National Forest, other than timber that was owned by the Polson Logging Company, over this road prior to January of 1942?

A. Was there any timber?

Q. Taken out of the National Forest over this road that was—that is, forest United States owned timber that they had sold, taken out over this road before January, 1942? A. January 1, 1942?

Q. Yes.

A. I think there was a small patch there in section 9 along the road that was removed by the M. & D. Timber Company. I think right along in here was the first patch that the M. & D. Timber Company removed in the Forest Service.

Q. That is the only—that is the only timber that came out, however, that M. & D.?

A. Unless they had removed some in two. I am not sure of the date on that, that they removed from two.

Q. Did anybody remove besides M. & D.?

A. Yes, McKay removed some timber up in there.

Q. When?

(Testimony of Len Forrest.)

A. I am not sure of the date on that, either.

Q. Was that prior to January, 1942? [396]

A. Prior to January, 1942. I don't recall. I believe it was after, but I am not sure.

Q. And the M. & D. Timber Company—that is the one that is controlled by Mr. W. H. Abel?

A. Yes.

Q. As I understand your testimony, over a period of time from 1941, 1942, '43 and '44, you charged various operators in this township for the use of the road, have you not? A. Yes.

Q. And can you tell me whether your contract also gave them the right to use the lines that—you know what portions of this was taken under the original easement? A. Yes, just roughly.

Q. Did those contracts with the operators permit them to use those roads, too?

A. As I recall, those contracts, not having one before me—as I recall, they granted rights over the Polson Logging Company lands that have no connection with this, plus any rights we may have over other portions of the road that the government at that time was seeking to acquire.

Q. And we are talking now about the contracts with W. H. Abel Logging Company? A. Yes.

Q. The M. & D. Timber Company. Was there one more?

A. No, I think that was all that I mentioned.

Mr. Keenan: I think that is all.

Mr. Metzger: Half a second.

(Testimony of Len Forrest.)

Redirect Examination

By Mr. Metzger:

Q. Mr. Forrest, you were asked on cross examination with respect to the timber that Polson Logging Company owns within the forest, if you did not expect the government would grant you a permit to take that timber out, and I think you said that you thought you would probably get such a permit? A. I think so.

Q. That permit would be—what would be the nature of that permit?

A. It would be a typical United States permit that they issue for crossing their lands, or right-of-way, or whatever you might call it. They charge you for it.

Q. And you have to construct your own road?

A. You have to construct your own road, and then pay for any damage you do. You pile brush, and burn it.

Q. The Polson Logging Company has offered the government a permit to cross its lands here on exactly the same terms, has it not? [398]

A. Identical.

Mr. Metzger: That is all.

Recross Examination

By Mr. Keenan:

Q. What are those terms? What is that price?

A. We have offered——

Q. No, not what you have offered here, but what the Forest Service——

A. The Forest Service terms?

(Testimony of Len Forrest.)

Q. Yes. What do they charge?

A. The United States permit—I don't know the rate they charge, depending on the length of the road.

Q. So much per mile, or any fraction thereof?

A. As I recall.

Q. You don't know how much a mile?

A. No, I don't offhand.

Mr. Keenan: I think that is all.

Redirect Examination

By Mr. Metzger:

Q. That is a charge for crossing wholly unimproved raw lands, without a semblance of a road or trail upon it, isn't it?

A. Well, yes, or if you go through their timber, why you [399] pay for the timber and so forth, depending upon if you went through raw land, you would go through clear from scratch. You just enter and build your own roads, according to their specifications, and if it was timbered land, why they would permit you to cut enough timber for your right-of-way, and they would charge you for the timber.

Q. What I am getting at is, this permit does not relate to the use of any such a road as is shown in these exhibits A-3, 4, and 5? A. Oh, no.

Q. It is a permit to go in and construct your own road in timbered land? A. That is right.

Q. For which you pay for the permit, you pay for the timber that you cut down, and you built your own road at your own expense?

A. That is right.

(Testimony of Len Forrest.)

Recross Examination

By Mr. Keenan:

Q. As a matter of fact, the charge on that is based on a mile or fraction thereof, and just barely covers the cost of administration by the Forest Service of that, isn't that the fact? They have to go out and have a [400] man check to see what you have cut? A. You are speaking of timber?

Q. Yes, they have to have a man go and see what you cut in building a road?

A. Yes, they have to scale your timber if you are cutting timber off of the right-of-way.

Q. They go out and have somebody inspect your road, don't they?

A. You mean while it is being built?

Q. No, while it is being built or after.

A. I am not sure on that.

Q. Well, you know they check up on you some way?

A. Oh, yes, if you are going through timber they come out and see that the timber is properly scaled, and the brush and chunks and so forth aren't any hazard.

Q. To see that you clean it up so there is no fire hazard? A. Yes, sir.

Q. Now, have you ever been denied the use of a road in the Forest Service.

A. Not to my knowledge.

Mr. Keenan: I think that is all.

(Witness excused.)

The Court: It is now time for our afternoon recess.

(Recess 15 minutes.)

CHARLES E. REYNOLDS,

produced as a witness on behalf of the Respondents, after being duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Blair:

Q. Will you state your name, please?

A. Charles E. Reynolds.

Q. Where do you reside, Mr. Reynolds?

A. Tacoma, Washington.

Q. What is your business?

A. I am a forester with the Joint Committee on Forest Conservation.

Q. You are employed by the Joint Committee on Forest Conservation? A. That is right.

Q. You are a professional forester?

A. Yes.

Q. Where did you receive your formal education, Mr. Reynolds?

A. State College of Forestry, Syracuse, N. Y.

Q. What degree?

A. Bachelor's degree and Master's degree.

Q. In forestry? A. In forestry.

Q. After your graduation from the Forestry

(Testimony of Charles E. Reynolds.)

School of New [402] York, what experience have you had in the actual practice of forestry?

A. I started in college in 1928, and I finally got through the place in 1934. During the process I worked a year and a half with the Forestry Department of New York State, and roughly about a year with the United States Forest Service. Subsequently I was employed by the United States Forest Service, and worked until 1938 in various places in the eastern part of the United States.

Q. What states did you work in?

A. Louisiana, Texas, Tennessee, Virginia, Michigan, Illinois.

Q. That was with the United States Forest Service?

A. With the United States Forest Service, yes, and then I left their employment to work for the Snoqualmie Falls Lumber Company at Snoqualmie, Washington, doing various forest activities, and worked there for two years, until about the 1st of 1940. Then I worked for the Forestry Department of Weyerhaeuser Timber Company in general forestry planning, appraisal and timber cruising, fire protection—just a variety of activities just in forestry, and about the middle of 1941 I left their employment to work on the Joint Committee on Forest Conservation. That committee is a group of interested lumbermen who are interested in conservation of forests. They are financed by the Pacific Northwest Loggers Association and West [403] Coast Lumbermen's Association, and Mr. William

(Testimony of Charles E. Reynolds.)

B. Greeley is my boss, and head of this activity, of the United States Forest Service.

Q. Do representatives of the Forest Service participate in the activities of this Joint Committee in an advisory capacity?

A. We try to cooperate as much as possible. We both have the same objectives in getting this land to grow trees.

Q. Are tree farms used——

A. Yes, I am in a way responsible for the operation of that forestry nursery at Nisqually. We have a modern tree nursery. We have about a forty-five thousand dollar investment in that tree nursery.

Q. Mr. Reynolds, can you give an idea to the jury—the jury some idea of the extent of the practice of reforestation in the United States at the present time?

A. Well, this might be summarized up by the tree farm movement which started about the middle of 1941, formally. We have about eleven million acres of forest lands in private ownership and in tree farms, and we have here in the Douglas Fir region of Oregon and Washington, two million acres. There has been a lot of tree farming. It is essentially like signing a pledge to go on the wagon. These men agreed to do two things. One to continue [404] to maintain their lands to grow trees, and second to harvest their crop of timber—to get a new crop of timber by re-seeding on the lands, and——

(Testimony of Charles E. Reynolds.)

Q. Now, so far as——

A. (Continuing): ——to protect it from fire, of course.

Q. So far as availability of land for growing a new forest is concerned, what factors determine its relative desirability or lack of desirability?

A. The basic importance is the quality of that land, how much timber it will grow in a certain period of time. We call that site quality, and the second factor is accessibility, and the third factor, depending on the value of the land—that is, the nature of the value of land, would be the amount of restocking or second growth forest lands, and the age of the trees, and——

Q. Pardon?

A. There is another factor. That is the ease with which it can be protected from fire, because forest fire is a serious matter, and if there is very serious danger of forest fire, it is less desirable.

Q. In your employment with the Joint Committee, do you have occasion of supervising the management of these two million acres in Oregon and Washington, devoted to tree farms?

A. Yes, our work is to promote interest in land owners—interest [405] them in growing timber on their lands, interest them in the proper harvesting of lands—the harvesting of timber, and trying to get the old lands growing trees, and our work is to work with these forest owners and get them to do better and better forestry, the best we can. The

(Testimony of Charles E. Reynolds.)

trees are going to mean much to your kids, and mine—the trees that grow on this land.

Q. In the course of your employment, do you have occasion, with respect to these certified tree farms—two million acres in Oregon and Washington, to know the activities that are being carried on in the way of forest management of those regrowth areas?

A. Yes, I have made some notes here in our report of 1944, what they have accomplished on these tree farms; what they have actually done in one year on this two million acres of Douglas fir lands. They built four primary lookouts——

Mr. Keenan: If the Court please, I do not know what bearing how many lookouts have been built on two million acres of tree farms, has.

The Court: I think he can summarize.

A. Four primary lookouts, two hundred and ten miles of fire protection roads, seventy-four miles of telephone lines, planted over five thousand acres——

Q. Are substantial sums of money spent in management and [406] protection of these forests?

Mr. Keenan: Of course substantial sums of money are spent by private owners of forests in the United States. I do not see where it has any value on the lands taken in this case.

Mr. Blair: It has a very direct bearing on the value of the roads taken in this case.

The Court: He has answered it.

A. To best illustrate, in Grays Harbor County there is two other tree farms that are practically

(Testimony of Charles E. Reynolds.)

adjacent to the Polson Logging Co. One is the Clemons tree farm of the Weyerhaeuser Timber Company, started in July, 1941. They have spent substantially over a quarter million dollars.

Mr. Keenan: That is objected to, what has been spent next door.

The Court: That objection is sustained.

Mr. Keenan: Will the Court entertain a motion to strike the answer?

The Court: Yes, the answer will be stricken and the jury instructed to disregard it. That does not show what the Respondent spent on their tree farm.

Q. Mr. Reynolds, when did you first become acquainted with the township wherein the roads that are being condemned here are located? [407]

A. About the 1st of September, 1943.

Q. Did your acquaintance or your occasion to visit the property at that time have anything to do with this litigation?

A. No, it did not. I knew nothing about it, and paid no attention to it.

Q. What was the purpose in your visiting that township at that time?

A. The purpose was to go over the lands owned by the Polson Lumber Company and analyze it and show them the forestry possibility, and show them the additional work to be done on that land to bring it in good shape; to give them a picture and get them to go ahead in forestry.

Q. And how long did you spend examining those lands?

(Testimony of Charles E. Reynolds.)

A. Oh, I spent until about January 1, 1944—from September to January.

Q. In other words, you were in there approximately three months? A. Yes, sir

Q And did you type the lands in that township as to their growing possibilities?

A. Yes, I did. I mapped there the different ages and the amount of restocking on the land.

Q. And how, generally, do you classify the lands, with respect to the site quality? [408]

A. Are you referring to the area—which area?

Q. I want to know how you generally classify them. Then I will ask you how you did classify this land. What is the basis of classification?

A. Oh, yes. We classify forest lands in five classes, depending on its ability to grow trees. We have class one that grows trees fastest, and class five that grows trees the poorest. Just to illustrate from Forest Service figures, in the experimental station in Portland, which shows class five—you can grow on class five seven thousand board feet. On site one you can grow sixty-two thousand board feet. It is just like so many crops, some will grow a lot of trees and some wont. It is a very important consideration in appraising land value.

Q. One, which would grow sixty-two thousand board feet, and site five which would grow, as you testified, would grow seven. Can you classify the lands that are in the township through which the road runs under condemnation traverses, so far as their site quality is concerned, using the scale of measurement that you have just described?

(Testimony of Charles E. Reynolds.)

A. Yes. Primarily I used information furnished me by the experimental station in Portland, and corrected this data in the field. Basically that land is site two or better. There is considerable of the area site one.

Q. How usual or unusual is it to find an area of that land [409] that grades class two or better?

A. It is not very common. It is above the average, I would say, for commercial private land.

Q. And did you survey the amount of restocking that is on that area?

A. Yes, the best I could. I tried to estimate and map out the area and the quantity on the land.

Q. And would you advise the jury generally with respect to the restocking that is on that land?

A. I thought that land was very well stocked. It is not as good as we would like it, but it is very well stocked, with the exception of four hundred and eighty acres that had a fire in 1937, I would consider it all satisfactorily restocked. You realize in regard to analyzing this restocking, you take areas of not less than twenty acres. If you try to strike up a fair average by areas, the age runs from one year to twenty years. I would like to qualify that, too, because that is just the area that I considered tributary to those growths, the area owned by the Polson Logging Company and their associates, and tributary to the roads in question here.

Q. That includes the property of how many acres?

A. Approximately twelve thousand acres.

(Testimony of Charles E. Reynolds.)

Q. And what did you say the age spread of the regrowth in that area is? [410]

A. Between about one year to twenty years.

Q. Now with respect to this area, if it is going to be operated to produce a new forest, what is the necessity or desirability of having access roads in there to combat fire and otherwise manage and preserve the forest?

A. In my opinion it is very important to have roads in there. The roads are the heart of any forest management area, such as this is. Those trees are no good unless you can get them out, and they are very vulnerable to fire, unless you can protect them. In growing a new crop of trees it is very important.

Q. Is a logged off area where regrowth is starting, more vulnerable to fire than a mature forest?

A. Yes. The first twenty years, you see, a lot of bracken fern and grass and vegetation, and that is very inflammable. As the forest grows up it reduces the fire hazard, and it becomes less susceptible to fire, but you can have some severe fires on land that some of this is on—like some of this here.

Q. And how soon in your opinion will it be, before there will be forest products that should be harvested and removed from these lands?

A. Well, of course forest products such as cascara bark and cedar—generally forest products in conjunction with a new crop in about twenty years. About forty years of age [411] you can start to thin the limbs out and get pulpwood. We can get

(Testimony of Charles E. Reynolds.)

piling and poles, and we are going to get them from this private land which is accessible on which trees grow fast. That is going to be part of our economy —for twenty years in the future.

Mr. Keenan: I object to the witness' testimony as part of the economy for twenty years in the future.

The Court: He has answered.

Mr. Keenan: I move that be stricken.

The Court: Motion will be denied.

Q. Mr. Reynolds, are truck logging roads, as such, do they have a market value?

A. Well, they certainly do. It is very valuable.

Q. Do they have a fixed market value like potatoes or grain?

A. Well, that is hard to know just what you mean by the question, but I don't think they do. If I realize what you mean, I mean that it depends on the conditions more where the truck road is than the truck road itself. It is the surroundings.

Q. And each one presents a different and individual problem? A. As a rule, yes.

Q. Now are you familiar with the National Forest—that portion of the Olympic National Forest that is situated [412] in the basin of the West Fork of the Humptulips River that extends northerly from the roads that are under condemnation here?

A. In a very general way, yes.

Q. And don't answer this question, Mr. Reynolds, until counsel has an opportunity to object:

(Testimony of Charles E. Reynolds.)

What quantity of merchantable timber is located in that basin at the present time?

Mr. Keenan: That is objected to, if Your Honor please. I don't know that the timber in the National Forest has any bearing on the value of this road. I think it is incompetent, irrelevant and immaterial.

The Court: Oh, I think I shall let him answer the question, what the quantity is.

Q. The quantity.

A. That is in the West Fork of the Humptulips?

Q. Yes, that would——

A. Well, that would be tributary to the road?

Q. Well, it is in the basin of the West Fork of the Humptulips, northerly of the road that is under condemnation here.

A. Well, I haven't cruised that timber, and as one witness has said, I doubt if anybody cruised it. In general I estimate from the figures furnished me, around nine hundred [413] thousand feet in the West Fork of the Humptulips.

Q. Now, going over to the East Fork.

A. Excuse me, that is nine hundred million feet.

Q. There are three more naughts on it. Going over then to the East Fork of the Humptulips River and that part that is contiguous to the road that is under condemnation here, can you tell us what quantity of timber is located in that basin?

Mr. Keenan: Same objection, Your Honor.

(Testimony of Charles E. Reynolds.)

The Court: Same ruling.

A. I would estimate from the same figures about six hundred million board feet—at least that much.

Q. So that in the East and West Forks together, there would be one billion, five hundred million feet of standing timber that would be contiguous to the road that is under condemnation here?

A. That would be my estimate, yes.

Q. How long has truck logging been practiced in this area, Mr. Reynolds?

A. I really don't know, because I first came here, as I said, in September, 1943. You are referring to the Polson area?

Q. No, I meant the Douglas fir area generally.

A. In general. Well, it is a long time before I hit this country. [414]

Mr. Keenan: I will stipulate with you, Counsel, it is 1927 and 1929.

Q. And state whether or not, Mr. Reynolds, it is a matter of rather ordinary practice in truck logging in these days for one logger to hire the use of a logging road owned by another party at a rate fixed by the quantity of logs taken over the road?

Mr. Keenan: That is objected to.

The Court: I think I shall sustain the objection.

Q. Mr. Reynolds, state whether or not it is the policy of the Forest Service—well, state what the policy of the Forest Service is with respect to whether it logs its own mature timber or sells the timber to private loggers to cut and remove?

(Testimony of Charles E. Reynolds.)

Mr. Keenan: That is objected to, Your Honor. I think it has no bearing on the value here, the policy of the Forest Service with respect to the disposal of its own timber.

The Court: No, I don't think it is a matter of policy. I think it is a matter of law and regulation provided under the law.

Q. Well, can you state, Mr. Reynolds, what the practice is in the Forest Service with respect to whether it logs its own timber or sells that timber to private operators [415] to log?

Mr. Keenan: That is objected to, Your Honor. I think it makes no difference whether it is the practice, or under the law, or what the situation is. They act, of course, under statutes. I don't see it has any bearing.

The Court: The Court has ruled upon this issue that what timber is there in this National Forest that is contiguous to this—and moves out over this road, cannot be a factor in fixing market value of the road, or fixing appreciation or depreciation to the remaining land.

Mr. Blair: I want to get the witness far enough so I can make an offer of proof, covering—or to come within that ruling that the Court has just announced, and if the objection to this question is sustained, then I will use that as the basis for making an offer of proof.

(Question read.)

A. I think it has.

Q. What was the practice?

(Testimony of Charles E. Reynolds.)

Mr. Keenan: If you are asking this preliminary to an offer of proof, I will withdraw my objection.

A. As far as I am aware, I think the general practice is to sell the timber to private operators.

Q. Mr. Reynolds, would you have, if you had been either the owner, willing, but not compelled to sell, or prospective buyer, willing, but not compelled to buy the road that is under condemnation here, on October 22, 1943, would you have considered and given consideration to the timber that is standing in the Olympic National Forest to the north of the road, and would you have expected that that timber would be sold by the Forest Service in quantities—of reasonable quantities from year to year, and would you reasonably have expected that it would be logged over this road?

Mr. Keenan: That is objected to, Your Honor.

The Court: I will sustain the objection and allow an exception.

Mr. Blair: I guess that is all the direct examination. We desire to make an offer of proof, Your Honor.

The Court: Yes.

Cross Examination

By Mr. Keenan:

Q. What is the name of the association for which you work, Mr. Reynolds?

A. The Joint Committee on Forest Conservation.

(Testimony of Charles E. Reynolds.)

Q. Actually—I beg your pardon, have you finished? [417] A. That is all right.

Q. The objectives in the main of that committee are almost the same as those of the Forest Service, isn't it, except that your committee is interested in doing with private lands something very similar to what the Forest Service does with its own lands?

A. Yes, the objective of our Joint Committee and the Forest Service are exactly the same.

Q. And both organizations are very much interested in seeing that as much timber as possible is made available for cutting?

A. That is right.

Q. Is that right? A. Yes, sir.

Q. And both organizations are eventually interested in preventing any fires spreading and starting? A. Yes.

Q. And I think you said that you first went down there on this ground in September, 1943?

A. That is right.

Q. And at whose request did you go there?

A. Polson Logging Company.

Q. And what did they request you to do?

A. To look over all their property, about eighty-four thousand acres, make a forestry analysis of the property [418] and size it up and shape it up.

Q. Had they made an analysis before that time, themselves—that is, the Polson——

A. That I am not familiar with the workings enough of the company. They had made maps and

(Testimony of Charles E. Reynolds.)

other things, some of which I used, but just what they have done—I was not acquainted with the company at all until then, and had not been on the area.

Q. They purported to furnish you with all the material they had? A. What?

Q. Did they purport to furnish you with all the material they had with reference to the extent of restocking and so forth, and the cutting records and so forth, on this eighty-four thousand acres?

A. Yes, they did. They showed me the ownership cutting maps, and grades, and roads.

Q. And when were you first requested to go down there?

A. About—I should say about the latter part of July, 1943.

Q. What is the oldest tree farm in the Pacific Northwest? A. Clemons Tree Farm.

Q. Where is that?

A. That is in Grays Harbor, south of the town of Montesano, in general. [419]

Q. Is that the Weyerhaeuser—

A. Yes, that is the Weyerhaeuser tree farm.

Q. Clemons is a subsidiary to Weyerhaeuser, is it?

A. Yes, I believe that is the relationship. I am not certain, of course.

Q. When was that tree farm established?

A. July, 1941.

Q. Do you know of any tree farm in the Northwest where they have cut any forest products?

(Testimony of Charles E. Reynolds.)

A. Certainly do.

Q. Where?

A. We have a bunch of small tree farms in Snohomish County. They are not very big, maybe sixty to a hundred acres—small farmers—owners, and they have cut a lot of piling and a lot of poles, and very valuable forest products.

Q. When were those tree farms established?

A. Well, they were established—I can't give you the exact year, even, but I think in 1944—about the middle of the year.

Q. 1944? A. Yes.

Q. When were the trees cut, before or after the farms were established. A. Both. [420]

Q. But it was not anything that had grown on the land since the farm had started?

A. I would say not. It takes about forty years to do that.

Mr. Keenan: I think that is all.

(Witness Excused)

Mr. Blair: Your Honor, I do want to reserve the right to make an offer of proof.

The Court: You may.

Mr. Blair: Mr. McGillicudy.

BLAIN H. McGILLICUDY,

produced as a witness on behalf of the Respondents, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Blair:

Q. Will you state your name, please?

A. Blain H. McGillicudy.

Q. Where do you reside?

A. At Eugene, Oregon.

Q. What is your business?

A. A Forest engineer. [421]

Q. For what period of time have you practiced at—have you been engaged in forest engineering?

A. In private practice since 1941.

Q. And what was your formal education, Mr. McGillicudy?

A. It was short course work, University of Washington, College of Forestry.

Q. When was that?

A. That was back in 1915.

Q. And what has been your experience since that time in forestry work?

A. Well, mine isn't forestry work in that sense. As a technical forester I do more the logging engineering work, and the actual construction of railroads, truck roads, and the cruising of timber, and surveying of—generally of timber areas to see the value or the grade for plywood mills and pulp mills,

(Testimony of Blain H. McGillicudy.)

for whoever might be interested in those types of timber.

Q. And what experience have you had, then, in logging engineering and other engineering work in connection with the valuation and removal of timber?

A. My experience in logging engineering starts back in the original survey of the Polson Logging Railway from Humptulips City to Quinault, in 1915, and then through various activities of cruising, compass work, on the Quinault Indian Reservation for the Indian Service, [422] inspecting logging contracts—one adjacent to this tract for the Slade Lumber Company, and then up to the war—first World War. Then I spent 1917—part of 1917 and '18 in France with the 10th Engineers, returning in 1919.

Beginning in the fall, I followed logging engineering work ever since, except during 1926 and '27, when I was Field Engineer and Assistant on Design of the Tumwater Paper Mill and the Schaffer Pulp mill here in this city.

Q. Now, during the times other than when you were working on these two pulp mills, for what firms have you done forest engineering work—that is, logging and other forest engineering?

A. Oh, Dempsey Lumber Company, this city, Avery Logging Company in Arlington, the Hama Hama Logging Company, Mason County Logging Company, Weyerhaeuser Timber Company, Cobbs & Mitchell, Booth-Kelly Lumber Company, Rose-

(Testimony of Blain H. McGillicudy.)

burg Lumber Company, United States Plywood, Harbor Plywood, Eugene Plywood, Olympia Veneer, Elk River Timber Company.

Q. Well, that is enough, Mr. McGillicudy. Now in the last—let's limit it to a period, say in the last five years, have you had any experience in laying out and supervising the construction of truck logging roads? [423] A. I have.

Q. Will you give the jury an idea of some of the roads that you have either laid out or supervised the construction of, or been connected with the construction of?

A. Remell-Sellers, common carrier in Oregon. Consulting engineer for the Cobbs & Mitchell Lumber Company.

Q. On what kind of a project?

A. Class A Logging road, joint construction.

Q. Where was that located?

A. In Polk County, Oregon.

Q. Has that been constructed? A. Yes.

Q. And you supervised the construction of that?

A. I represented both companies in the project.

Q. That is, both of the joint owners who put that project in. Mr. McGillicudy, have you had occasion to advise prospective buyers and sellers with respect to values of timber properties?

A. From the timber standpoint?

Q. Yes. A. Yes.

Q. Have you made a study of cost to reproduce new as of October 22, 1943, the logging railroad that is on the property under condemnation in this case?

(Testimony of Blain H. McGillicudy.)

A. I have. [424]

Mr. Keenan: If the Court please, it is objected to and the Government moves the answer be stricken. There isn't any logging railroad on the property.

Mr. Blair: Not only the logging—pardon me, pardon me, if I used the word railroad. It is my error.

Q. Mr. McGillicudy, have you made a study of the cost to reproduce new as of October 22, 1943, the truck logging road that is situated on the property that is under condemnation in this case?

Mr. Keenan: If the Court please, that is objected to for the reason there is no foundation laid or showing made here that any reasonable, prudent man would consider cost of reconstruction of this road in fixing his purchase price, or the cost of reconstruction of the road would be anywhere near the market value of the railroad, or any prudent and reasonable man would——

The Court: I think I shall let him answer.

A. I have.

Q. Now in making that study. Mr. McGillicudy——

Mr. Blair: Mr. Bailiff, just hand this to the witness.

Q. (Continuing) Now, Mr. McGillicudy, you say you did make a study of the cost to reproduce new as of October 22, [425] 1943, the truck logging road that is on the land under condemnation?

A. I did.

(Testimony of Blain H. McGillicudy.)

Q. And what in your opinion was the estimated cost to reproduce new that improvement as of that date?

Mr. Keenan: If the Court please, that is objected to, the cost of building or constructing a logging road new as of that date has no bearing on the issues here. It does not tend to prove value, and certainly does not show the value to the United States. There is no showing that anyone would pay that sum for the road, or that a reasonable man would reproduce the railroad or a truck road.

The Court: I am going to let him answer the question, and allow you an exception, and I assume the question takes all those various segments of the road in?

Mr. Blair: It does, Your Honor, all the road under condemnation in this proceeding.

Mr. Keenan: Does that include any of the road constructed by the government under the CCC appropriations?

Mr. Blair: It includes all of the roads owned by the Polson Logging Company that is being taken in this proceeding.

Mr. Keenan: The Governor objects on the [426] further ground that the Answer, as the record now stands, will prove the cost of improving, placed by the government, and specifically, by the CCC road.

Mr. Blair: That was placed there long, long before this proceeding.

Mr. Keenan: At the Government's expense, and

(Testimony of Blain H. McGillicudy.)

I understand improvements placed there by the government can not be collected for twice.

The Court: The objection will be overruled, and an exception allowed.

Q. What was that estimated cost to reproduce new, Mr. McGillicudy?

A. A total amount, estimated, including the building and——

Q. Let's have the figure and then we will explain it. A. $214,647.23.

Q. All right now, will you tell the jury, Mr. McGillicudy,—just explain to them how you went about in making this study of cost to reproduce new.

A. I took a survey crew over the property and measured all the roads involved, the lengths, and then we analyzed all the construction work performed over that distance, of chain growth, after the practice generally employed in replacement.

Q. Now in analyzing that work, did you have accessibility to the profile maps that were made when this road was [427] originally built?

A. I did.

Q. And did you make use of those in estimating quantities of cuts and fills? A. I did.

Q. And did you likewise measure out those cuts and fills and estimate them on the ground?

A. We did.

Q. Proceed.

A. We spent a little over two weeks building up the estimate and walking the entire job to see that

(Testimony of Blain H. McGillicudy.)

the alignment, as near as we could tell, complied with the map.

Q. Now, before we go to that point of alignment, what length of road did you find, or determine, is involved?

A. It is a little over—to be exact it is 12.52 miles.

Q. Of what type of road?

A. Of railroad grade.

Q. And what quantity of road—that is, other than railroad grade, in the original construction?

Mr. Keenan: The Court please, may I have a running objection to all of this testimony on reproduction costs, new?

The Court: Yes.

Mr. Keenan: So I won't have to interrupt.

The Court: Proceed.

The Court: Proceed. [428]

A. 2.2 miles of road.

Q. That road that was originally constructed as a truck or vehicle road, and never had been a railroad? A. That is right.

Q. While the figure of 12.52 miles was road that was built originally as a railroad and late converted to truck road use? A. That is right.

Q. Now in those figures that you have given us of total length of road, did you include the portion of the road that is across Section 16, which has been referred to as the State School land section?

A. We deleted that.

Q. You took that out? A. Yes.

(Testimony of Blain H. McGillicudy.)

Q. And did you determine the total amount of acreage that is involved in these roads.

A. Yes.

Q. And that was for the purpose of determining the clearing that you would do in constructing the roads?

A. Am—do you want that figure?

Q. Yes, you might. A. 172.88 acres.

Q. All right. Then will you tell us after you determined the quantity of road to be constructed, and the location [429] of that road, what was the next step you took in arriving at the estimated cost to reproduce it new?

A. We took the yardage—excess yardage over a normal ratio, allowable per station of one hundred feet of grade, which is the unit on which we measured all surveys, and from that we calculated the gross excess yardage in cut and fill that was handled. On minimum work we allowed the contractor 175 cubic yards per station of one hundred feet. On all in excess of that we paid the contract excess yardage values, to establish that cost.

Q. Now let's start at the first operation, Mr. McGillicudy, in the reproduction of this road. What would be the first field operation after the road has been surveyed, so far as the actual construction of it is concerned?

A. Our first cost is surveying.

Q. All right and what did you figure the cost of surveying would be?

A. The cost of survey was $7,360.60.

(Testimony of Blain H. McGillicudy.)

Q. All right, what is next operation?

A. An estimate of right-of-way to be cleared.

Q. And what was your estimate on that?

A. We had 36.43 acres of clearing, and that cost $10,929.00.

The next item was grubbing, which was the same, $10,929.00.

The next item was grading. We had 616.32 [430] stations. On the basis of base yardage per station, amounted to $52.50 per station, of one hundred lineal feet, amounted to $34,718.30. We had 116.54 stations of road at $50.00 per station, amounted to $5,827.00.

Q. That was the part that was built in the original instance as a vehicle road and not as a railroad?

A. Exactly, there never was any rails or ties on that road.

The excess excavation and embankment which was the fill, included all the heavy fills and heavy cuts in excess of our base, amounted to 121,926 cubic yards excess yardage, at forty cents a yard, amounted to $48,770.40.

We had 661.32 stations of ballast, at $105.60 per station in place. That amounted to $69,832.39.

We had 112.26 stations of ballast on roads other than railroad grade, at $50.00 a station—amounted to $5,613.00, exact.

Q. Now let me interrupt you there, Mr. McGillicudy, with respect to that ballast. What source, in your opinion, would be used to provide the ballast

(Testimony of Blain H. McGillicudy.)

for the construction of this road, or the theoretical reconstruction of the road?

A. The ballast has to be obtained from the Humptulips River, and the only place that we could figure there was enough ballast to ballast the road was in the region of the [431] Humptulips, adjacent to Humptulips City, and had to be trucked in as this road was built.

Q. Now, with respect to bridges, what consideration if any, in making your reproduction cost new study, did you give to the bridge across Stevens Creek and the bridge across O'Brien Creek?

A. We wrote them off entirely.

Q. In other words, nothing was included for those two bridges in your $214,000 figure?

A. No.

Q. Now with respect to the remaining four bridges on the road, and by "those" I mean the bridge across the Humptulips and the three Donkey Creek bridges. Did you make an estimate to reproduce new those bridges? A. I did.

Q. Will you tell the jury what those cost figures were?

A. The Humptulips bridge—that is the West Fork bridge, replacement value, $12,752.04. The Donkey Creek Bridge No. 1, $5,563.57. Donkey Creek No. 2 and No. 3—No. 2 was $962.32. No. 3 was $1,216.21. That gave us a total, not including Stevens Creek and O'Brien Creek of $20,494.14.

Q. Now, there is a bridge on Section 16 which is referred to as the School Land section.

(Testimony of Blain H. McGillicudy.)

A. There was. [432]

Q. And did you give any consideration to the cost of reproducing that? A. No.

Q. For the reason that it is on that State School land section? A. Exactly.

Q. As a matter of ordinary practice, Mr. McGillicudy, that road that is across that school land section, in private ownership, would you expect any difficulty about renewing the easement from time to time as it might expire?

Mr. Keenan: Objected to.

The Court: I will sustain your objection.

Mr. Keenan: I don't know whether the question was answered or not.

The Court: If it was answered, the jury is instructed to disregard it.

Q. Summarizing, you had a reproduction cost of $20,949.14 for the four bridges that you made a cost study on? A. Yes.

Q. And did you have some other element of cost in the reproduction study, other than that what we have testified to here?

A. We allowed some culverts up in Section 1, and that was only $170.00.

Q. And the total of the items that you have testified here, [433] produce the sum of $214,647.23, to which you testified they do produce that total?

A. Yes, sir.

Q. The detail that you testified to?

A. Yes, sir.

Mr. Blair: Mr. Bailiff, will you show the witness

(Testimony of Blain H. McGillicudy.)

the paper marked for identification Exhibit A-13.

Q. Mr. McGillicudy, the Bailiff has handed to you this summarization marked for identification Respondents' Exhibit A-13. That is a summarization of the figures you just testified to, excluding the quantity figures and the cost figures?

A. Yes, that is the identical report.

Mr. Blair: We furnished a copy to counsel for the Government, and we now offer A-13.

Mr. Keenan: If the Court please, that is objected to, first on the grounds reproduction cost now is not the measure of damages here and do not tend to prove value or in any way influence the market price for the road such as this, and for the further reason this is a mere summary of the witness' testimony.

The Court: On the first ground the Court has ruled against you. It all depends on what weight and consideration should be given by the jury, in the final analysis. [434]

On the second ground I think I have to sustain the objection. It is merely a summarization of the witness' testimony.

Mr. Blair: That is correct, and the only basis upon which it is admissible. There has been a long recitation of the figures, and a summarization of that testimony ought to be of value to the jury.

The Court: I do not think that over objection, it would be any more admissible than the testimony of any other witness, used to refresh his memory

(Testimony of Blain H. McGillicudy.)

or make the basis of his oral testimony, and I shall have to sustain the objection, since it is objected to.

Q. Mr. McGillicudy, what period of time did it require you to complete this reproduction cost study? A. About two and a half weeks.

Q. And do you have with you here now the working papers which are the detail behind the figures that you testified to here on the stand?

A. I have.

Q. They are also the detail behind the identification A-13? A. They are.

Q. Are those working papers voluminous?

A. You mean large?

Q. A lot of them? A. No. [435]

Q. You have them here, and they are available to counsel if he desires to see them for the purpose of cross examination? A. I have.

Q. Now Mr. McGillicudy, did you also make a study as of October 22, 1943, to determine the amount of depreciation in the road—include within your reproduction cost study, by saying that I mean to exclude the two bridges and the portion of the road in Section 16 that you did not include in your reproduction cost study?

A. We allowed for depreciation.

Q. And did you determine the estimated cost to reproduce new as of October 22, 1943, less accrued depreciation?

A. We allowed for depreciation on the final figure, yes.

Q. And what was your final figure of cost to

(Testimony of Blain H. McGillicudy.)

reproduce new, less accrued depreciation? I think it is not on the identification.

A. I haven't it there. I think the figure is $194,014.38.

Q. All right, would you tell us now how you arrived at the depreciation in the property as of October 22, 1943?

The Court: Now this figure of a hundred and ninety-four thousand, is that the amount of depreciation?

Mr. Blair. No, that is the reproduction cost less depreciation.

A. The depreciation figure was $20,632.85. [436]

Q. And it is that figure subtracted from the cost to reproduce new of two hundred and fourteen thousand, plus the figure of a hundred and ninety-four thousand plus, reproduction less depreciation?

A. That is it.

Q. Now will you tell the jury what went into and how you arrived at that depreciation figure?

A. On the bridges, we allowed an 80 percent depreciation in the West Fork bridge. In the Donkey Creek bridges, No. 1 we allowed a 50 percent depreciation, and in Donkey Creek bridge 2 and 3, we totally depreciated them.

Q. You totally depreciated it? A. Yes.

Q. All right, what other elements of depreciation did you find in the property as of October 22, '43?

A. On roads C and D, we allowed for the clearing of right-of-way,—swamping of right-of-way as you

(Testimony of Blain H. McGillicudy.)

would call it, to clear the ditching so that the road could be properly drained.

Q. All right, what do you allow for that?

A. Line C and D, swamping, we had a hundred —that would be sixteen thousand feet, thirty-two hundred dollars.

Q. That is the amount of depreciation in order to restore or accomplish that clearing and swamping? A. That is it. [437]

Q. All right, what is the next item?

A. We had sixty stations, or six thousand feet of ditch cleaning. That was $300.00.

Q. In other words, $5.00 a station?

A. Yes. We had 343 stations at $5.00, to clean and level the surface. That was $1715.00. Grade depreciation $5,215.00.

Q. All right, now, you testified to the percentage figure on the bridges, but you did not give us the dollar depreciation figure on the bridges.

A. On the West Fork, we had for the fender—bridge fenders, we depreciated—we depreciated the entire fender, and on the West Fork bridge that gave us—pardon me, on the fender we depreciated the entire replacement which we estimated at $1279.52. The fender was entirely destroyed and had to be replaced. We depreciated the bridge $9,178.02. Donkey Creek bridge 1, $2781.78.

Q. Numbers 2 and 3, you depreciated?

A. We depreciated those two, which was $2,-178.53. It gave us a total depreciation of $20,632.85.

Mr. Keenan: Will you give me that figure again?

(Testimony of Blain H. McGillicudy.)

The Witness: $20,632.85.

Mr. Keenan: Is that just bridges?

The Witness: On bridges and grade, both. [438]

Mr. Blair: Your Honor, that is all on the subject of reproduction cost new, and we are going into market value. That would be an appropriate time——

The Court: Your market value would be brief, would it not? I would like to complete his direct examination.

Mr. Blair: It won't be too brief, but we will go ahead with it.

The Court: Well, go ahead.

Q. Now, Mr. McGillicudy, you say you spent about three weeks on this, or how long were you on the property at the time you were making your reproduction cost new study?

A. Well, we walked that the better part of two weeks.

Q. And that was in the fall of 1945?

A. October and September.

Q. And had you been generally familiar with the Humptulips area prior to that time? A. Yes.

Q. For how many years have you been acquainted with that area?

A. The first time I was through the lower half of this survey was in 1916.

Q. And have you been in the country and familiar with the operations in that general country, from time to time since then? [439]

A. I have.

(Testimony of Blain H. McGillicudy.)

Q. Have done engineering work in there?

A. No, I haven't done any engineering work in that section, since 1912.

Q. Since 1912? A. Since 1912.

Q. But you have been in the country and familiar with the country? A. I have.

Q. And familiar with the operations in the country? A. Yes.

Q. Mr. McGillicudy, have you formed an opinion as to the fair cash market value——

The Court: I wonder, if you had not better, if you are going to ask this witness a question, what his opinion is as to the highest and best use of the land first?

Q. Mr. McGillicudy, what in your opinion was the highest and best use of the lands under condemnation here, with the improvements that were then on them, on October 22, 1943?

A. It would be that value.

Q. What was the highest and best use? In other words, its use is what we want to talk about.

A. The lands? [440]

Q. Yes, with the improvements.

A. Included in this right-of-way—confined to this right-of-way?

Q. Yes. A. A truck road.

Q. Now Mr. McGillicudy, what in your opinion, or have you formed an opinion, as to what the fair, cash market value of that property was on October 22, 1943?

(Testimony of Blain H. McGillicudy.)

Mr. Keenan: That is objected to, Your Honor. I don't think it is shown yet the witness is sufficiently qualified. He says the highest and best use is for a truck road, but there is nothing in the record, so far as I recall now, to show he has had any experience in appraising truck roads.

Mr. Blair: He testified he has advised buyers and sellers with respect to such properties.

The Court: He may answer the question.

Q. Have you formed an opinion, Mr. McGillicudy?

The Court: You may answer that question "yes" or "no," have you formed an opinion?

A. Yes, sir.

Q. What in your opinion was the fair, cash market value of this property on that date?

Mr. Keenan: At this time I renew the objection that I just made to his testifying on the [441] ground he has not shown that he is sufficiently qualified to express an opinion as to the value of a truck road in the open market.

The Court: Objection will be overruled, and an exception allowed.

A. The fair market value of the road——

The Court: That is, what somebody would pay for it that did not have to buy, and somebody would sell it for, that did not have to sell it, and a cash transaction.

Q. You do understand what has just been defined by the Court as fair cash market value, and that is the definition you used in forming your opinion?

(Testimony of Blain H. McGillicudy.)

A. Yes.

Q. All right, what in your opinion was that figure? A. $250,000.

Q. Now, Mr. McGillicudy, in arriving at that figure, did you give consideration to the estimated cost to reproduce new, and the estimated cost to reproduce new less accrued depreciation, to which you testified here? A. I did.

Mr. Blair: You may cross examine. [442]

Cross Examination

By Mr. Keenan:

Q. Mr. McGillicudy, who would you sell this road to for $250,000? A. There are investors.

Q. Well, who would buy it for $250,000?

Mr. Blair: Let him answer. He started to answer.

A. It is a very good investment gamble.

Q. And who would the gambler be?

A. A man interested in timber exploitation.

Q. And what timber would that man be wanting to exploit?

A. The timber behind this road.

Q. Who owns that timber?

A. Well, the majority belongs to the Government.

Q. And what do you mean by the "majority"?

A. Of the timber.

Q. Well, how much is that majority?

A. About a billion, six hundred million.

Q. And how much is in private ownership?

(Testimony of Blain H. McGillicudy.)

A. I wouldn't know as to volume.

Q. Would you have any idea?

A. I haven't any idea.

Q. Would you say it was less than ten percent of the government owned timber? [443]

A. Very much less.

Q. Less than five percent?

A. I wouldn't say. I couldn't testify as to that.

Q. You did not determine then, before you decided, who your purchaser would be—how much private ownership there would be of timber tributary to this road?

A. No, I wouldn't take that into consideration.

Q. You just took into consideration there is over a billion feet the government owned?

A. Regardless of ownership.

Q. Were you considering timber owned other than by Polson Logging Company, in arriving at your fair, cash market value? A. Exactly.

Mr. Keenan: At this time, Your Honor, I move to strike all the testimony of this witness—pardon me.

At this time I move to strike the testimony of this witness as to the fair cash market value of the lands. He has stated that a purchaser of the land at his figure would be some one interested in taking a gamble on—in exploiting the government timber which this road extends to, and I submit that is not——

The Court: I am inclined to think that the mo-

(Testimony of Blain H. McGillicudy.)

tion has to be granted. I am willing to hear from the [444] Respondents.

Mr. Blair: Your Honor, we believe the correct rule of law is that the value of this property to the government at the time of the taking, can not be considered by the jury. It is the question of what did the Polson Logging Company lose, and what did the government acquire, that is material here. However, it already appears as evidence in this case that it would have been reasonably expected by an owner, or a prospective purchaser of this logging road in 1943, that the timber in the government's national forest would be, from time to time, sold. The testimony was that it is the last stand and the most immediately available stand to keep the mills in the Grays Harbor area in operation, and a buyer and a seller at that time would normally and naturally have considered the prospect that from time to time that timber would come out over this road, and they would get the value of the service of the road in removing that timber.

Now the rule is that you can not consider the value of the timber to the taker, and when the taker is the only one that could use the property for the purpose taken, then that use can not be considered, but when the service is available to the taker, and when the use for which the taker is taking the property could have [445] been available to another party, then that use may be considered. So here, a private owner could—Polson Logging Company or someone else, could have continued to own this road. True,

(Testimony of Blain H. McGillicudy.)

it is, they are not entitled to any damages for any prior right to purchase government timber out of the government watershed. They are not entitled to a nickel for that, but they are entitled to the value a business man would have paid in October of 1943 for this road, with the prospect that the purchasers from the government of that timber in the forest, are going to bring that timber out over this road as long as the charges for doing so are reasonable. That was one of the things that Mr. Abel testified; as the government's witness—his name I don't now recall, testified—he said had he owned this road in October, 1943, he would have expected to haul that timber out of the Upper Humptulips as it was sold by the government to private loggers, he would have expected to haul it out.

The Court: Of course, Mr. Blair, the fact they might have expected, would not necessarily make it so.

The Supreme Court of this state has passed upon a set of facts that are almost identical. I can't give you the case, but it involves a narrow canyon through [446] which the timber of a certain watershed must pass, and of course they held that no consideration must be given to the possibility and the potentiality of the timber being sold or being marketed—being harvested, and that is doubly true, it seems to the Court, in a case where the Federal Government is the owner of the timber, and they elect not to put any of it on the market for ten or fifteen years, and the realm of speculation continues, and uncertainty,

(Testimony of Blain H. McGillicudy.)

and I think it is an improper element to consider,—that is, the taking by the government, and I shall have to hold against you, but I am not going to foreclose you from asking this witness what his opinion is as to the value of the property that has been taken, eliminating a calculation based upon revenue that might be produced by the cutting and marketing of the government timber, and I shall have to strike his answer upon which he has fixed values, and instruct the jury to disregard it.

Redirect Examination

By Mr. Blair:

Q. Mr. McGillicudy, in your opinion would an owner or prospective purchaser, being informed of the general situation existing with respect to this road and the timber surrounding it, and in view of the ownerships as [447] they existed at that time, have given to this road for its use in hauling timber to—or its use by permitting others to haul their timber coming out of the Olympic National Forest to the north of this road?

The Court: That is independent of the government owned timber.

Mr. Blair: That includes—irrespective of who owned the timber, but in view of the actual ownership at the time. I want him to take into consideration who owned it, the fact that the government did own substantially all of it, and answer whether in his opinion the buyer and seller would have given value to the road for hiring the road out to pur-

(Testimony of Blain H. McGillicudy.)

chasers of that timber to remove their timber over the road.

The Court: I will sustain the objection.

Mr. Blair: Now we desire to make an offer of proof in the absence of the jury.

The Court: Mr. McGillicudy, step down, and the jurors will be excused now until tomorrow morning at 10:00 o'clock. The Court will remain in session, however.

(Whereupon the jurors retire from the court room.)

Mr. Blair: We offer to prove by the witness Charles Reynolds, that the property under condemnation, [448] had value to buyer and seller, generally, on October 22, 1943, irrespective of whether that buyer or seller owned any timber in the Olympic National Forest north of the highway, because an informed and reasonably advised and prudent person in the position of a buyer—prospective buyer or prospective seller, would have taken into consideration and given value to this road, because of the reasonable prospect that the timber in the national forest would be sold to private loggers, and that in ordinary experience and probability, that timber would be removed to market over the road that is under condemnation, and that owners of that timber —purchasers of it from the government and other owners in the forest would pay the reasonable value of their use of this road for that purpose, and that those factors would have been considered by advised and informed persons in the position of pros-

pective buyers and sellers of this property on October 22, 1943.

The Court: Your offer does not offer to include how much of that timber would be sold in any given period of time.

Mr. Blair: No, it does not. I don't know whether the testimony is in the record, but it may be. If not, I would like to include in the offer that they would have anticipated that in the ordinary and reasonable [449] course of events that timber would be sold by the Forest Service at the rate of approximately twenty million feet per year.

Mr. Keenan: It is objected to, Your Honor.

The Court: The objection will have to be sustained to the offer, and an exception allowed.

Now then, as to your last witness, did you have an offer of proof you wanted to make?

Mr. Blair: Yes. We offer to prove by the witness McGillicudy that an informed person, being in the position of either a prospective buyer or a prospective seller of the property under condemnation here, would have dealt on October 22, 1943, for this property, reasonably expecting that the timber in the Olympic National Forest to the north, to the extent of approximately one billion five hundred million feet would in the ordinary and normal course be brought out of that forest, using this road as one of the links to transport it from the forest to market; that they would have reasonably dealt on the expectation that that timber is to be logged at the rate of approximately twenty million feet per year; that in determining and arriving finally at a price

between them, they would have given consideration to the practicability and probability of the timber coming out over this road, and would have further given [450] consideration to the fact that it is possible to remove that timber by other routes, primarily by a route extending westerly from—or easterly from Public Highway No. 101, which goes through the Olympic Forest, which route would have been more expensive to construct and more expensive to operate over, and that such an informed buyer and seller would have been affected, and their negotiations would have given consideration to the probability that as long as the toll charges or rental charges for the use of this road was reasonable, that this road would have been used for the removal of that timber in the ordinary course of human experience.

Mr. Keenan: That is objected to, Your Honor, as being incompetent, irrelevant and——

The Court: Objection will be sustained, and exception allowed.

Mr. Blair: Now, if the Court please, there is one case in particular that I would like to call the Court's attention to, because it seems to me it goes so much farther than the case at Bar on the facts, and it ought to be controlling.

(Whereupon argument by counsel, at the conclusion of which adjournment was taken until 10:00 o'clock a.m., Nov. 20, 1945.) [451]

November 20, 1945, 10:00 o'clock a. m.

The court met pursuant to adjournment; all parties present.

Mr. Stella: If the Court please, I have an additional instruction here that we thought we would file the original and a copy of it with the Court at this time, and it will be attached to our requested instructions.

BLAIN H. McGILLICUDY,

resumed the stand for further examination, and testified as follows:

Cross Examination (resumed)

By Mr. Keenan:

Mr. Keenan: If the Court please, when we recessed, or just before we recessed, yesterday, I had made a motion to strike the testimony of Mr. McGillicudy, the witness on the stand, insofar as it related to fair cash market value of the property. I understood that Your Honor had ruled on it last night. I am not sure that the jury has been advised that the testimony is stricken [452] and should be disregarded.

The Court: I do not think the jury have been instructed that the testimony, insofar as it deals with fair cash market value as fixed by this witness, based upon the potentialities or possibilities of carrying over this road the timber in the National forest.

(Testimony of Blain H. McGillicudy.)

Mr. Keenan: That is right, Your Honor.

The Court: And the jury will be instructed that the motion to strike the testimony of this witness has been granted, and the jury will disregard his testimony as to the fair, cash market value of the property herein being taken, insofar as it deals with a value that rests upon the collection of revenues or tolls from hauling timber out of the National forest, wherein such timber is within this watershed, and that testimony will be disregarded by you and the testimony of the witness in that regard stricken.

Mr. Metzger: Will you allow an exception?

The Court: Yes.

Mr. Blair: Less there be some misunderstanding I would like to have Your Honor suggest to the jury that that is only the witness' testimony with respect to market value of $250,000, and not his testimony with respect to the reproduction cost of two hundred and fourteen thousand, or reproduction less depreciation of one [453] ninety-four thousand.

The Court: That is correct, that does not deal with this witness' first part of the testimony, with reference to reproduction and matters of that nature.

Mr. Keenan: If the Court please, the United States now moves to strike the testimony of this witness insofar as it relates to reproduction cost new, and reproduction cost new less depreciation, on the ground that it is apparent that that would be considered in fixing the fair, cash market value only if the National forest timber was involved,

(Testimony of Blain H. McGillicudy.)

and on the further ground that there is no foundation whatsoever for the admission of any such tesimony. There is no basis laid. There is nothing in the record to indicate that any possible purchaser would consider that.

The Court: The motion will be denied and an exception allowed.

Have you finished with the direct examination of this witness?

Mr. Blair: Yes.

The Court: And you may proceed with the cross examination.

By Mr. Keenan: (resumed)

Q. Mr. McGillicudy, I understand yesterday you testified [454] to the area of the land taken here in terms of acres, and I believe you said there was 172.99 acres in the right of way proper, but that excludes tract 1. Is that right?

The Court: You will have to answer up, Mr. McGillicudy, because the Reporter can't get your nod. He isn't looking at you all the time.

A. Yes, that excludes tract 1.

Q. And does the figure of 172.99 include the right-of-way through Section 16, in Township 21, 9?

A. No.

Q. That is excluded? A. That is.

Q. And your acreage for tract 1 was one point one 0 acres? A. Just as they itemized it.

Q. I see. Tract 2 and 3 is the same as the government's ten and ninety? A. Identical.

Q. Now you have also testified yesterday, as I

(Testimony of Blain H. McGillicudy.)

recall, concerning I guess all seven of those bridges on this road, and am I correct in saying that you had depreciated the Stevens Creek and the O'Brien Creek bridges a hundred percent? A. I did.

Q. And then there is that Dry Ravine Bridge. Is that in [455] Section 16?

A. That is in Section 16.

Q. Did you make any allowance for the Dry Ravine bridge? A. That was thrown out.

Q. Why did you throw it out?

A. Because it was—belonged to that right-of-way.

Q. In other words, because it was on State owned land? A. Exactly.

Q. And the Humptulips River bridge, what was your reproduction cost new on that—I think——

A. A little over eleven thousand.

Q. Well, I have a note. It says $12,752.04. Is that the correct——

A. That includes the fender.

Q. Including fender?

A. Including fender.

Q. How much did you depreciate that bridge?

A. 80 percent.

Q. What in your opinion would be the normal life of one of these bridges?

Mr. Metzger: Which one?

Q. Would there be any difference in the life of the bridges, starting from the time they were constructed. A. Oh, yes.

(Testimony of Blain H. McGillicudy.)

Q. All right, what would the life of the West Fork and [456] Humptulips bridge have been?

A. Under heavier railroad traffic. The expected life of a cedar structure is about sixteen years, as a railroad bridge.

Q. All right, suppose it is used for truck hauling?

A. That is optional to the trucker. He will continue to repair and prolong the life probably 25 years.

Q. In other words, the life of the bridge is optional with the trucker? A. Exactly.

Q. You mean he puts in enough replacements from time to time, and he can just prolong the life indefinitely? A. Exactly.

Q. How much did you assume that Donkey—what was your figure for the Donkey Creek bridge, $5,563.57 new, is that?

A. I believe that is the figure, $5,563.57.

Q. And how much did you depreciate that bridge? A. 50 per cent.

Q. What do you think the normal life of that bridge would be new?

A. Under railroad operation, 16 years, with a new deck.

Q. How much under truck logging?

A. With proper repair, 20 years.

Q. And Donkey Creek No. 2, your figure now, $962.32. [457]

A. I believe that is the figure.

Q. How much did you depreciate that bridge?

(Testimony of Blain H. McGillicudy.)

A. 100 per cent.

Q. And Donkey Creek No. 3, is your figure $1216.21 A. Yes.

Q. How much did you depreciate that bridge?

A. 100 percent.

Q. Now, anybody using this road then, I take it, would practically be compelled to reconstruct a new bridge over Stevens Creek or O'Brien Creek, or make a fill or do something of the kind?

A. Stevens Creek can not be filled, due to the water hazards.

Q. Then they would have to put in a new bridge?

A. New bridge.

Q. Did you estimate the cost of that new bridge?

A. I did not.

Q. Do you have any idea what it would run?

A. About $3,000.

Q. And how about O'Brien Creek?

A. The bridge was not in existence when we looked at the grade. I would hazard a judgment that you could either replace the bridge twice, or put in a fill once.

Q. What would you assume that it cost to put in the bridge?

A. I don't know the length of the original bridge.

Q. That is the longest of any of the bridges that are on the [458] road, is it not?

A. O'Brien Creek? Oh, no, that is a narrow gulch.

(Testimony of Blain H. McGillicudy.)

Q. How about this bridge in Section 16, what condition was it in?

A. I would say in the same condition as O'Brien Creek bridge 1.

Q. You mean Donkey Creek 1?

A. Or Donkey Creek 1. It needed a new deck.

Q. How about the piles?

A. They were cedar; as near as I could tell the bridge was partially filled.

Q. Piling in good condition?

A. I would say so.

Q. Well, did you hazard an estimate as to the remaining life of that bridge?

A. I would fill that structure.

Q. How much would that cost?

A. By deflecting the road, probably $2500. I wouldn't follow the bridge alignment.

Q. So that anyone attempting to use this road for anything more than light traffic, they would be compelled to replace about four bridges almost immediately, is that right?

A. You have a maintenance expectancy on all roads, regardless of usage. [459]

Q. I don't think you are answering my question, Mr. McGillicudy. I asked you if it was not going to be necessary for anybody using this road to replace four bridges almost immediately. Is that maintenance. A. After—yes, uh-huh.

Q. What do you suppose it would cost if this road was in operation for bridge maintenance, each year—all seven bridges?

(Testimony of Blain H. McGillicudy.)

A. Maintenance only?

Q. Bridges only. I am including the bridge in Section 16, the State owned section, too.

A. What unit of cost shall we use?

Q. Gosh, you got me. I am no engineer, but how much would they have to pay out each year to have these bridges in usable condition?

A. We have to have some unit to set that in.

Q. Lets talk about dollars.

A. We don't arrive at it that way.

Q. Well, how do you arrive at it?

A. By usage unit.

Q. Well, all right, lets assume it is going to be used for just the tree farm—patrol back and forth?

A. Well, that would have to be capitalized.

Q. Well, can't you tell us how much you think it would cost to maintain those bridges per year, if you had only the [460] light traffic and fire patrol car furnished, or something of the kind?

A. I wouldn't maintain them at all.

Q. What would you do with them?

A. I would put fly roads around them until such time as I needed them.

Q. Well all right. Lets assume now they are going to be used for log trucks.

A. Well, I think we could maintain them on the basis of $200.00 a mile, as we would maintain the road.

Q. $200.00 a mile, huh?

A. On the same basis as the road.

Q. That means per year? A. Per year.

(Testimony of Blain H. McGillicudy.)

Q. Well, there isn't a mile of bridges there all told, is there? A. No.

Q. So your figure is less than $200.00 to maintenance those bridges?

A. No, pro-rated in a general setup, you might expend nothing on one section of the road, and put it all in one mile.

Q. I guess I don't understand you. Is this mile going to include some road?

A. Oh, yes, that would be pro-rated over the entire project. [461]

Q. In other words, what is the length of this road? A. Some 12.2 miles.

Q. Well, now, does that 12.2 miles include Section 16? A. No.

Q. You have got to keep that up too, don't you?

A. I would discontinue that bridge.

Q. Well, then, you would have another capital outlay, wouldn't you? A. Yes.

Q. What I am trying to find out, Mr. McGillicudy, is, you say $200.00 per mile. How much would the whole road cost to maintenance of the bridges, per year?

A. Well, we don't maintain bridges that way. As a rule we totally reconstruct them after their life is run.

Q. Well don't you think a prudent operator would estimate how much it was going to cost him for maintenance of bridges?

A. We built them in such a way that we don't have maintenance on them.

(Testimony of Blain H. McGillicudy.)

Q. Well, what do you call it when you put a new deck on a bridge?

A. That is when the life of the bridge is nearly run.

Q. All right, suppose the life of the bridge is 20 years. What year would you expect to put the new deck on?

A. At sixteen, possibly 12. [462]

Q. And what do you call that, maintenance?

A. No.

Q. What is that?

A. That would be—well, it could be called maintenance, too.

Q. What other account would you put it in?

A. There wouldn't be any other account if you didn't have any other charge to apply it against.

Q. Well, when you talk about this $200.00 figure for the bridges per mile, assume that your basis or unit was $200.00 per mile for maintenance of bridges. Now how much does that figure up per year for the seven bridges?

A. Well, you could probably figure between fifteen hundred and two thousand dollars could be held to that reserve.

Q. Well, what do you mean fifteen hundred to two thousand dollars held for that reserve?

A. If you wanted to build up a bridge reserve.

Q. I want to know what you think a proper maintenance fee would be for the seven bridges for one year?

A. That goes in by the mile.

(Testimony of Blain H. McGillicudy.)

Q. Well, I don't care, take it out of the mile and tell us how much for the seven bridges for one year, can't you do that? A. No, I can't.

Q. How long did you study in the University of Washington.

A. I took short course work. [463]

Q. What? A. Short course work.

Q. How much do you think it would cost per year to maintain the road and the bridges?

A. Two hundred dollars a mile.

Q. Two hundred dollars a mile. How much is that per year?

A. That is, oh, it will run about three thousand dollars.

Q. Now in that three thousand dollars are you going to build any new bridges? Suppose you have to replace one of these bridges within—say 20 years, or at the end of 20 years. Does your three thousand dollars include replacement?

A. That is capital outlay.

Q. That isn't in the three thousand dollars?

A. No.

Q. How long ago did you leave the Grays Harbor country? A. 1917.

Q. Have you worked there since?

A. For the Port of Grays Harbor in '21, for a short period.

Q. What do they build logging railroads for?

A. For the removal of timber products—forest products.

Q. Did you ever hear of one being built except

(Testimony of Blain H. McGillicudy.)

just so far as the timber extends? In other words, they start in and they build into timber, and they keep extending the roads, do they not, as they have to press forward to [464] reach more timber?

A. They do.

Q. And when the timber is gone, that the operator-owner—correct accounting practice has the road completely written off on the books of the company?

Mr. Blair: To which we object as wholly incompetent, irrelevant and immaterial, and not proper cross examination and has no relevancy as to what the fair cash market value is or what the accounting——

The Court: I think it might be cross examination in connection with the reconstruction costs.

Mr. Keenan: It is offered for that purpose.

The Court: The objection will be overruled, and an exception allowed.

A. It is common practice.

Q. Would you advise a client of yours to purchase this road at anywhere near its replacement cost new, less depreciation, for use in connection with the tree farm?

Mr. Blair: To which we object as not proper cross examination.

The Court: Objection will be overruled.

A. On one consideration, yes.

Q. What is that consideration?

A. The age of the tree farm.

(Testimony of Blain H. McGillicudy.)

Q. All right, what age would the tree farm have to be? [465] A. 40 years.

Mr. Keenan: At this time, if Your Honor please, I move to strike the testimony of this witness as to reproduction cost new less depreciation, on the ground that the witness has just testified that he would advise a client of his to purchase the road at somewhere near that cost, upon one condition, to-wit: that the tree farm is 40 years old, and this tree farm, according to the evidence is not 40 years old, nor is the timber on the ground 40 years old—cutting started in 1916.

The Court: Motion will be denied and an exception allowed.

Mr. Keenan: May I have an exception, Your Honor?

The Court: Yes.

Mr. Keenan: I think that is all.

Redirect Examination

By Mr. Blair:

Q. Mr. McGillicudy, assuming there were upward of seventy million feet of timber owned by others than the United States Government lying in the territory of the sections to the north of lands through which this road passes, and in the Olympic National Forest, would you advise [466] your client owning the tree farm there to pay the reproduction cost of that road?

Mr. Keenan: That is objected to, Your Honor. He is talking now of privately owned timber—is that right?

(Testimony of Blain H. McGillicudy.)

Mr. Blair: Yes, sir.

Mr. Keenan: Which is not in the Polson ownership.

Mr. Blair: Part of it is.

Mr. Keenan: If it isn't all in Polson's ownership and shown here, the question is objected to. In other words, it is to speculate, and too remote when that timber would come out. They don't have to use this road. It is purely speculative.

The Court: I am inclined to believe that it is in the realm of speculation, as to the timber that is owned by the Respondent, and of course they would know when they want to move it, and of course if some showing were made that plans were under way to move this other private timber, at or about the time this land was taken. There has been no such showing, as I recall.

Mr. Blair: No, there is no such showing of that kind.

The Court: So I shall sustain the objection [467] to the question in the form it is asked, but not depriving you from reframing your question to include any timber that the Polson Logging Company actually owned or controlled that they planned on moving over this road.

Q. Mr. McGillicudy, if your client owned the timber in the area that might logically and reasonably move over this road, would that affect what you would advise him to pay for it?

Mr. Keenan: If the Court please, that is

(Testimony of Blain H. McGillicudy.)

objected to until it is shown how much timber, and where the timber lies.

Mr. Blair: I am merely asking him if that would affect the price.

The Court: Objection overruled, he may answer.

A. Yes.

Mr. Blair: That is all.

Recross Examination.

By Mr. Keenan:

Q. And Mr. McGillicudy, suppose that the timber owned by your client was immediately adjacent to this road—we will say was less than five million feet, would that change your opinion?

A. As to re-sale? I don't understand the question. [468]

Q. All right, you are advising a client now as to whether or not to purchase this road. The client has a tree farm, we will assume, that he is going to serve with, and he also owns, we will assume, less than five million feet of timber that is immediately adjacent to that road. Now would you advise him to purchase it, at anywhere near reproduction cost new, less depreciation?

A. For five million?

Q. Five million feet of timber, or less, immediately adjacent to it? A. No.

Mr. Keenan: That is all.

Mr. Blair: That is all.

(Witness Excused)

FRANK D. HOBE,

produced as a witness on behalf of the Respondents, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Blair:

Q. Will you state your full name for the record?

A. Frank D. Hobe.

Q. And where is your place of residence, Mr. Hobe?

A. At National, Washington.

Q. And that is in the Eastern part of the county? A. That is right.

Q. Of Pierce county. With what organization are you presently connected, Mr. Hobe?

A. With the Harbor Plywood Corporation.

Q. And where is their principal place of business? A. At Hoquiam, Washington.

Q. And what is your connection with the Harbor Plywood Corporation?

A. I am vice-president, and manager of the logging division.

Q. And where is your principal logging operation conducted?

A. In Lewis county, out of National.

Q. Out of National, and is that the operation that used to be the Pacific National Logging operation? A. Yes, that is correct. [470]

Q. Now, Mr. Hobe, will you advise the jury concerning your formal education—your schooling?

(Testimony of Frank D. Hobe.)

I mean, after you left high school, so far as your professional education is concerned.

A. I had two years in the College of Forestry at the University of Washington.

Q. And when was that, Mr. Hobe?

A. 1914 and '15.

Q. And prior to the time you started attending the University, and during that time, did you have any experience in the logging business?

A. Yes, I started working during the summer time in my father's logging camp, in 1907.

Q. And continued to work after you completed your second year in the forestry school?

A. That is right.

Q. And for what reason did you discontinue your attendance at the University?

A My father died at that time, and I had to take his place in the operation of the logging camp.

Q. You then personally took charge of the operation of your father's logging business?

A. That is right.

Q. And where was that business conducted, Mr. Hobe? A. In Grays Harbor County. [471]

Q. In what part of the county?

A. Between Grays Harbor and Willipa, in the southern end of the county.

Q. And how long did you continue on with that logging operation? A. 1919.

Q And at that time, did you finish logging out your show of timber there?

A Yes, we completed the operation.

(Testimony of Frank D. Hobe.)

Q. And what did you next do?

A. I went into business with the Saginaw Timber Company as president and manager of the new corporation. We organized and called it Hobe Logging Company.

Q. Did you have an interest in that operation?

A. Yes.

Q. An ownership interest?

A. Half interest.

Q. And where was that operation carried on?

A. In the same territory, and the same equipment that we formerly used.

Q Was that down in Grays Harbor County?

A. Yes, sir.

Q. And you used the same plant and equipment that the Hobe Logging Company had previously——

A. That is right.

Q. How long did that operation continue?

A. Until 1922.

Q. And starting then in 1922, what did you do?

A. I was part of an organization that bid in a unit of Indian reservation timber adjacent to the Quinault River, and I was president and manager of the Hobe Timber Company from 1923 until 1927.

Q. And was that company engaged in logging that timber on the Indian reservation?

A. Yes, we were.

Q. During that period of time?

A. That is right.

(Testimony of Frank D. Hobe.)

Q. And you were in charge of that logging operation? A. That is correct.

Q. What was your next enterprise when that logging was completed, Mr. Hobe?

A. We organized the North River Logging Company in 1929, and I acted as president and manager of that company until 1942, at which time we finished our operations and dis-incorporated.

Q. Where does that company, the North River Logging Company, operate?

A. In the North River district south of Aberdeen, in Grays Harbor County.

Q. Now, that operation extended from '29 to '42. During [473] part of that period, did you become interested in another logging enterprise?

A. Yes

Q Will you explain to the jury about that?

A. Well, with Mr. Lindberg of this city, we organized the Lindberg and Hobe Logging Company in 1937, and I sold my interest in that company in 1942.

Q. And while you were connected with the Lindberg and Hobe Company, did that company have occasion to acquire a considerable amount of timber? A. Yes, we did.

Q. During the period then, from 1942 when you severed your connection with Lindberg and Hobe, and after the operation down in the North River—the North River Logging Company had been finished up, what did you do?

A. I was in business as forest engineer and timber cruiser for about a year and a half.

(Testimony of Frank D. Hobe.)

Q. Doing consulting work for various lumber and timber concerns? A. That is right.

Q. And when did you go with your—in your present position with Harbor Plywood Company?

A. The Spring of 1944.

Q. In the Spring of '44?

A. That is right. [474]

Q. And you are still in that employment now?

A. Yes, I am.

Q. During the years that you have been in the logging business, Mr. Hobe, have you had occasion to buy and sell timber? A. Yes, I have.

Q. Have you had occasion to advise and consult with others concerning the purchase and sale of timber. A. I have.

Q. Have you had occasion to construct logging roads? A. I have.

Q. Both railroads and truck?

A. Both railroad and truck roads.

Q. And have you had connections with transactions where truck logging roads were purchased and sold?

A. You mean, the taking over of a truck road by a purchaser?

Q. Yes. Have you been connected with transactions where people you were advising bought or sold property, which included roads?

A. Yes, I have.

Q. How long has truck logging been practiced in this area, Mr. Hobe?

A. Well, it started about the time of the first

(Testimony of Frank D. Hobe.)

World War, but it could hardly be called truck logging at that time. It was done with hard rubber tires, and was not very [475] successful, and it was on a small scale, actually truck logging with pneumatic tires started in about 1929.

Q. In about '29? A. Yes.

Q. And when did you first get into the truck logging business? A. In 1929?

Q. At the time they started using pneumatic tires? A. Yes, sir.

Q. And have you been more or less in the truck logging business ever since?

A. That is right.

Q. In the truck logging business, is it the practice of operators from time to time, to hire the use of truck logging roads of others for transportation of logs?

Mr. Keenan: That is objected to, Your Honor, what the practice of loggers expecting to hire the use of roads are, has no bearing on this case

The Court: Objection overruled

Mr. Keenan: Have an exception, Your Honor.

A. That is the occasional practice.

Q. And has truck logging made accessible to market, areas of timber that in the days of railroad logging would not have been accessible to market?

A. That is very true. [476]

Q. Mr. Hobe, are you connected with the industry committee on reforestation, which Mr. Reynolds—by whom Mr. Reynolds is employed?

A. Yes, I am a member of that committee.

(Testimony of Frank D. Hobe.)

Q. And would you explain to the jury—would you tell them what the proper name of the committee is, and explain to the jury what it is?

A. It is known as the Joint Committee of Forest Conservation, supported jointly by the West Coast Lumbermen's Association and the Pacific Northwest Loggers' Association, and the purpose of the committee has to do generally with reforestation, and good forestry practice by the lumber industry.

Specifically, we are asked to examine and certify all proposed tree farms.

Q. And, as a member of that committee have you had occasion to examine the data and records and materials submitted by owners in support of their application for certification of tree farms?

A. Yes, I have.

Q. And did you have an opportunity to know in a general way the work that is being done and the money that is being spent in the development and management of those tree farms?

A. Yes, that is right. [477]

Q. How long have you been familiar, Mr. Hobe, with the Humptulips basin area, through which the road under condemnation here goes?

A. I have been generally familiar with that area since 1912.

Q. Since nineteen hundred and twelve?

A. That is right.

Q. And did you make an inspection of that road

(Testimony of Frank D. Hobe.)

that is under condemnation, for the particular purpose of informing yourself to testify in this case?

A. Yes, I did.

Q. Will you tell the jury approximately when that was done? A. In August of this year.

Q. And Mr. Hobe, what, in your opinion, is the highest and best use to which the land being condemned here, with the road improvements on it can be used, or is adaptable.

A. As a truck road.

Q. As a truck road. Don't answer this question, Mr. Hobe, until counsel has had an opportunity to object

Mr. Hobe, in your opinion, on October 22nd, 1943, if an owner willing, but not compelled to sell, was negotiating with a buyer willing, but not compelled to buy, for the sale of that property including the truck road improvements upon it, would they, as informed people, have given consideration to the government owned timber in the Olympic National Forest to the north of that road? [478]

Mr. Keenan: That is objected to, Your Honor. Whether or not the buyer and seller would have given consideration to government timber to the north, has no bearing on the issue of valuation in this case.

The Court: Well, the Court of course has ruled.

Mr. Blair: It is only for the purpose, Your Honor—I am not trying to oppose the Court's rul-

(Testimony of Frank D. Hobe.)

ing, but only for the purpose of making an offer of proof to complete the record.

The Court: Well, your question was so stated, whether such a prospective buyer would give consideration. I think I shall have to overrule the objection.

Mr. Blair: You may answer.

A. Yes, a buyer would give consideration to the timber north of this area.

Q. And Mr Hobe, would the fact that that timber is situated, there, north of this area—would that fact, in the consideration given it by that buyer and that seller, have influenced the market value of the road that is under condemnation here?

Mr Keenan: If the Court please, that is objected to as was the previous question. The timber in national forest cannot be considered here in fixing the [479] fair cash market value, and that is——

The Court: Well, the Court has so ruled, but this witness has qualified himself as an expert to express an opinion as to what consideration may be given, and you will have an opportunity to cross examine him.

Mr. Keenan: The situation, Your Honor, is that the witness is giving an opinion here—a factual opinion, which as I understand it, runs exactly contrary to the law of our case.

The Court: There is no reason why he cannot be asked the question in the other way, as a matter of law if such consideration would not be given.

(Testimony of Frank D. Hobe.)

Then, that would be his conclusion. I am going to let him answer the question.

Q. Mr. Hobe, would the consideration that such a buyer and seller would give to that consideration in the Olympic forest, to the north, have an effect upon the market value of the road at that time?

A. It would.

Q. Mr. Hobe, did you hear the testimony of—pardon me, strike that.

Mr. Hobe, have you formed an opinion as to the fair, cash market value of the property under condemnation here, with the improvements that are upon it as of the 22nd day of October, 1943, taking into [480] consideration all of these factors which in your opinion would be given consideration by an informed buyer and an informed seller, in negotiating for the purchase and sale of that property?

Mr. Keenan: That is objected to, Your Honor. The witness—in a few of the answers to the questions just previously put, has said that an informed buyer and seller would consider the timber to the north here as having a bearing on the value of the road. Now, the witness is asked if he has formed an opinion as to what the price——

The Court: The objection will be overruled and exception allowed. A. Yes, I have.

Q. And now, giving consideration to all of those factors, Mr. Hobe, including the factors that you previously testified to would be considered by that buyer and by that seller, what in your opinion was that fair, cash market value?

(Testimony of Frank D. Hobe.)

Mr. Keenan: Now, if Your Honor please, that question is objected to on the ground the witness is being asked what his opinion is on fair, cash market value, giving consideration to the government owned timber to the north of this property.

Mr. Blair: That is right. [481]

Mr. Keenan: It is identically the same situation we had yesterday afternoon with Mr McGillicudy.

The Court: Yes.

Mr. Blair: Yes. If the witness answers, he will have given consideration to those factors.

The Court: I shall have to sustain the objection, and the objection does not go to his qualifications as an expert to express an opinion.

Mr. Keenan: That is right.

Q. Now, Mr. Hobe, have you also considered the fair, cash market value, as the value that would be arrived at between that informed buyer and informed seller, as on October 22nd, 1943, without giving any regard or consideration to the timber that is in the Olympic national forest and owned by the United States? A. I have.

Mr. Blair: Your Honor, if I might interpose, I do want to make an offer of proof in connection with the sustaining of the objection to the last question, which I assume should be made in the absence of the jury.

The Court: Yes.

Q Will you now tell the jury, Mr Hobe, what the fair, cash market value was as of that date,

(Testimony of Frank D. Hobe.)

without giving any consideration on the part of either the buyer or the seller to the timber that is in the Olympic National forest, and [482] owned by the United States, but giving consideration to all other factors that would have been considered.

Mr. Keenan: If the Court please, that is objected to, because now the witness has—or the question would exclude from the witness' mind the national forest timber, but it would include other timber which is privately owned, and which is also speculative.

The Court: I think that is correct. The Court will sustain the objection to the question in the form it is made.

Mr. Blair: We would like to make an offer of proof in the absence of the jury.

The Court: Yes.

Q. Now, Mr. Hobe, will you state whether or not you formed an opinion as to the fair, cash market value of this property on October 22nd, 1943, giving consideration to all of the factors which in your opinion would be given weight by such a buyer and seller, except, excluding wholly from consideration any of the timber located within the Olympic National forest to the north of the territory through which this road goes.

The Court: Well, I think the Court has ruled the respondent—there has been a showing that the respondent has timber.

Mr. Blair: I was asking him to ignore [483] the whole of it in order to simplify the question.

(Testimony of Frank D. Hobe.)

Mr. Keenan: The same objection is interposed as was to the lost one. There is still included in here privately owned timber, not owned by the Polson Logging Company and not within the boundaries of the national forest. That is still one of the factors being considered by your question, isn't it?

Mr. Blair: Yes.

Mr. Keenan: In other words, this witness is being asked now for his opinion as to the fair, cash market value on October 22nd, 1943, considering timber ownerships in parts other than the Polson Logging Company outside of the national forest.

Mr. Blair: And timber contiguous to the road.

The Court: I think I am going to let him answer that question.

A. Yes, I have formed an opinion.

Q. And what, in your opinion, was the value, Mr. Hobe?

Mr. Keenan: May I object.

The Court: Yes. You may have an exception to the ruling.

Q. What, in your opinion, was that value, Mr. Hobe. A. $200,000.00.

Q. Now, in arriving at that opinion, Mr. Hobe, did you take [484] into consideration what, in your opinion, it would cost to construct this road?

A. Yes, I did.

Q. And to the condition of the road?

A Yes.

(Testimony of Frank D. Hobe.)

Q. And to the twelve thousand acres of tree farm that are contiguous to the road? A. Yes.

Q. And the present condition and growth on that tree farm. A. Yes.

Mr. Blair: That is all.

Cross Examination

By Mr. Keenan:

Q. Now, Mr. Hobe, just what mental processes did you go through to arrive at this figure of $200,000.00? Will you just explain to the jury what you did to appraise this property

A. Well, in the first place there are only three farms certified in Grays Harbor County, which was at one time perhaps the heaviest timbered county in the State of Washington. A tree farm without the proper system of roads is practically worthless. In putting myself in the position of a man that would control four townships in this area, with an arterial system of roads through the [485] center of it, I would certainly not want to turn loose of those roads for $200,000.00.

Q. Well, there are four townships here. Is your figure of $200,000.00 based on all of the roads in those townships? A. No, sir.

Q. Is your opinion of market value based on the fact that if you owned this 12,000 acres which is tributary to the road, you wouldn't want to part with the road for $200,000.00? Is that the basis on which you made the appraisal?

A. That is not the basis on which I made the appraisal.

(Testimony of Frank D. Hobe.)

Q. All right, what did you do to make the appraisal? How did you arrive at the figure $200,000? Did you do any figuring?

A. Yes, a good many ways of arriving at that figure.

Q. All right, how did you do it?

A. I think that testimony has shown that this land will eventually grow some 20,000 to 60,000 feet per acre.

Q. All right, what did you do to make the appraisal—what mental calculations did you go through?

Mr. Blair: He is telling you that just now, if he is permitted.

Mr. Keenan: He is talking about somebody else's testimony now.

The Court: Let's proceed, now.

A. That would also be my testimony, and that timber will [486] have a value—decided value. It is a 12,000-acre tree farm. It is going to be very valuable, and will necessitate a system of roads, not only to protect it and administer it, but to harvest it when it is ready for harvest, and therefore, the main consideration would be the replacement value of these roads.

Q. Well, who could you sell this road to for $200,000.00?

A. To anyone that you could sell the tree farm to.

Q. You would have to sell the road with the tree

(Testimony of Frank D. Hobe.)

farm. You can't separate the road from the tree farm, is that right?

A. Well, the road can be separated. I think it is, now.

Q. Well, I mean, in arriving at your valuation, Mr. Hobe?

A. The tree farm wouldn't have much valuation without the road, is that what you mean?

Q. No, I am just asking if your prospective purchaser at $200,000.00, is going to acquire the portion of the tree farm that is adjacent to this road as a part of the same transaction?

A Well, of course, the purchaser would have to have a need for the road or he wouldn't be interested in purchasing it.

Q. I appreciate it, but did you contemplate the sale would be of just the road, or did you contemplate that the sale would include that portion of the lands in the tree farm which were adjacent to the road. [487]

A. Well, I contemplated any purchase where an informed purchaser and an informed seller would have a reason for buying or selling the road. There are several reasons.

Q. All right, what would you think an informed person would buy the road, separate and apart from the tree farm which was contiguous to that road?

A. It could very well be that he would, yes, sir.

Q. For $200,000.00?

A. Yes, or more than that.

(Testimony of Frank D. Hobe.)

Q. All right, now. How is he going to realize on his investment of $200,000.00?

A. Well, maybe I am thinking about the timber north of there, now.

Q. Well, you have to exclude that from your mind, Mr. Hobe. A. Well——

Q. Now, do you think anybody would buy that road, by itself, for $200,000.00, if he excluded from his mind the timber to the north?

A. Well, the second value is in connection with the tree farm.

Q. Well, can you answer my question?

(Question read.)

The Court: Now, the question specifically is, do you think anyone would buy that road for $200,000.00, excluding the timber to the north?

A. The answer is yes. [488]

Q. For what purpose?

A In connection with the tree farm, possibly with logging.

Q. Well, I mean logging what?

A. Timber, other than the timber to the north.

Q. And timber, other than Polson Logging Company timber, or the timber owned by that purchaser?

A. Possibly Polson Logging Company timber.

Q. Or, are you thinking of him buying the road to log timber that he himself did not own?

A. No, I am not.

Q. Do you think——

The Court: It is time for the morning inter-

(Testimony of Frank D. Hobe.)

mission. The Court has some other matters. The Court will not adjourn but the jury will be excused for fifteen minutes.

(Recess.)

The Court: Now, you may proceed.

Q. I think in your direct examination, Mr. Hobe, you said that you had either purchased or sold truck logging roads in connection with other property? A. Yes, that is right.

Q. Did you ever sell one except in connection with other properties, or buy one?

A. I believe not. [489]

Q. As a matter of fact, every time anybody buys any cut-over land in Grays Harbor county, there is some—either logging truck roads on it, or a railroad grade, isn't there?

A. I wouldn't say abandoned railroad grade. Abandoned maybe for railroad purposes.

Q I say, every time you buy a section, for instance, of cut-over land, you are going to find either truck logging roads on it, or old railroad grades, aren't you? A No, that is not the case.

Q. Not necessarily true?

A. No, a great part of Grays Harbor County was logged into the water by skid roads in the old system of logging.

Q. And when did that stop?

A. About 1916.

Q. And when did it start?

A. Before I did, I guess, about 1890 or previous.

(Testimony of Frank D. Hobe.)

Q. And—but there has not been any logging directly into the river down there, has there, since about 1916? A. Not to any extent.

Q. So my statement would be, substantially true as to anything logged since 1916? Is that a fair statement, and some—a lot of it before 1916, isn't that true? A. I think that is right.

Q. How many acres are there that are served by the road here in question? [490]

A. I don't understand your question.

Q. All right, you say that this road is of value to the tree farm. How many acres of the tree farm does this road serve, or how many acres is used in connection with it?

A. This road might serve all of the 80,000 acres.

Q. How—why? A. That Polson owns.

Q. Why—how?

A. An outlet. Other roads branching off from it.

Q. Well, you would not put a road where it is now, if that road was intended to serve the 84,000 acres, I think it was testified here, would you?

A. I couldn't answer that without inspection of the rest of the area.

Q. Haven't you inspected the rest of the area?

A. Not the entire 84,000 acres, no.

Q. How long do you think it would take you to inspect that 84,000 acres?

A. I couldn't answer that question.

Q. Have you any idea?

A. No, I don't know the topography.

(Testimony of Frank D. Hobe.)

Q. Can you tell me just—do you know what land this road serves?

A. I would call this road the arterial road for the four townships adjacent to it. [491]

Q. Where are the other townships?

A. Well, the four townships are in a square block with this road, more or less through the center of it.

Q. All right. Well, there is one township shown there, a large part of twenty-one, nine, and where are the other three with relation to twenty-one, nine?

A. Well, they are east and west, and south of it.

Q. One is here (indicating), one is over here, and one is down here, is that right? A. Yes.

Q. Doesn't Polson have another road that runs up over here in the next township, possibly through a portion of this township? A. He may have.

Q. Don't you know? A. I don't know.

Q. How could you appraise this road without knowing, in connection with the tree farm, without knowing whether there were any other roads on it and where those roads were?

A. I could give a value from what I know about it, and what I have seen of it, without seeing the other roads in Grays Harbor.

Q. Did you assume there was any severance damage here?

A. To Polson Logging Company? [492]

Q. Yes.

(Testimony of Frank D. Hobe.)

Mr. Blair: He has not testified to any, your Honor.

The Court: Well, I don't know whether he has or has not. The question seems to have been suggested by counsel on both sides, and no one has directly asked it. When he talks about the value to the tree farm, you get into the realm of severance damages. I think I shall let him answer the question.

Q. Can you answer the question, Mr. Hobe?

A. Well, I have been asked to name a value in several different ways. In some ways I might consider severance damage. Others wouldn't.

Q. Who asked you to name the value in several different ways?

A. Without considering certain facts, you did.

Q. All right, but what I mean, in connection with your appraisal did you consider any severance damage that there was any?

A. Do you mean my appraisal of $200,000.00?

Q. Yes. Does that include any item of severance damage?

A. No, not in that appraisement.

Q. Well, you had another appraisal——

Mr. Blair: If the Court please, we object because the other opinion was excluded by the Court's ruling, and counsel knows that. [493]

Mr. Keenan: All right, I will re-frame the question.

Q. You had also appraised the same property with the government timber in, had you not?

(Testimony of Frank D. Hobe.)

A. Yes.

Q. And in that instance, did you think there was severance damage:

Mr. Blair: Now, if the Court please we object to that as wholly incompetent.

The Court: I think maybe I will sustain the objection, but I am going to have to—probably in the absence of the jury, have this question of severance damage settled in this case. If it is in, I want to know, and if it is out, I want to know.

Q. Mr. Hobe, when you appraised this road, considering its value for tree farm purposes, did you consider that there had or had not been any severance damage to the Polson Logging Company?

A. I did not consider severance damage to the Polson Logging Company.

Q. What is severance damage, Mr. Hobe?

A. Well, that is the damage that you would sustain by losing the use of the road, I think.

Q. You did not consider that?

A. No, I did not. [494]

Q. And then your figure of $200,000.00, is the damage which Polson would sustain because they could not use the road, is that right?

A. Well——

Q. Strike that question, I think it is misleading. Did you assume that Polson couldn't use this road after the government took it?

A. Well, that did not enter into the appraisal of the road.

(Testimony of Frank D. Hobe.)

Q. You did not consider that at all in your appraisal, is that right?

A. I did not appraise it on that basis, no.

Q. Now, tell me who could you sell the road to, without including for tree farm purposes—without including a portion of that tree farm.

Mr. Blair: Now, if that question is to call for a designation of John Doe, or Ex Logging Company, we object to it as being a wholly improper question. He is not required to produce the purchaser. The law assumes there is a purchaser.

Mr. Keenan: I am not asking, of course, for John Doe, or Richard Roe. I want to know what class of purchaser, and what that purchaser is going to do.

The Court: While, modified, the question to that extent——

Mr. Blair: We have no objection. [495]

Q. Now, can you answer that question, Mr. Hobe, and I am not asking for the name of any individual or company or corporation, but I want to know the class of purchaser, and——

Mr. Blair: Now, if the Court please, we object to that question as it is framed, because it says for tree farm purposes and it assumes the owner himself is going to operate the tree farm. There is no reason why the owner has to operate the tree farm, to use it in connection with the tree farm or haul the products of the tree farm on the road.

The Court: Of course, that gets you into the field of severance, immediately, if it is taking the

(Testimony of Frank D. Hobe.)

road depreciation—the value of the adjoining property, why that is severance.

Mr. Blair: The question asked who is he going to sell it to for tree farm purposes.

Mr. Keenan: As I understand the testimony of this witness, your Honor, he has testified to a fair cash market value of two hundred thousand dollars. He said that he did not consider severance damage. If he did not consider severance damage he must be selling the road.

Mr. Blair: That is correct.

Mr. Keenan: As an entity by itself, and I think when we get down to that point it is pertinent [496] to ask him to whom the road is going to be sold—I mean, the class of purchaser.

Mr. Blair: I have no objection to that.

Mr. Keenan: That is my question. Maybe it is going to be used for tree farm purposes, which he said he already assumed.

Mr. Blair: No, he said the highest and best use for this road is use as a road itself, not for tree farm purposes, but to use it as a road. If he will take that tree farm business out the question is proper, but not with that.

Mr. Keenan: All right, we will skip the question for a moment, if the Court please.

Q. I think you previously testified the highest and best use for this property taken was as a truck road, is that correct? A. That is right.

Q. Who did you assume was going to use the truck road—I don't mean name an individual, but

(Testimony of Frank D. Hobe.)

unless it be the Polson Logging Company, I want to know whether a logging company is going to do it or some class of the public?

A. I would assume that as a truck road it would be used mostly by the owner of the land in this general district, whoever that might be. [497]

Q. Would it also, you assume, be used by the purchasers of timber in the National forest?

A. The natural assumption is that that timber will come out over this road.

Q. And did you think the purchaser might pay a little extra because of that assumption? Do you think that the purchaser would pay two hundred thousand dollars if he completely excluded that timber from his mind in his calculations?

A. Yes, I think he would.

Q. And what do you think that purchaser would then use the truck road for?

A. To realize whatever he could out of it. I think it would be a good investment.

Q. All right, how is he going to realize on his investment?

A. Of course I considered the arterial outlet to a very substantial tree farm area. There are other ways. There may be mining developed in that district.

Q. Well, is the purchaser of this road for two hundred thousand dollars going to use it as a toll road?

A. I think it is generally conceded that timber found any place in the State of Washington has

(Testimony of Frank D. Hobe.)

got to have a road to get out to market, and that timber should stand its proportionate share of the cost of that road, no matter where it is. [498]

Q. Now, what timber is going to stand the cost?

A. Any timber growing in this tree farm area, and any timber that might naturally be expected to move over this road to the north.

Q. Do you think if the timber to the north was excluded and the purchaser was confined to this tree farm alone, that he would buy that road for two hundred thousand dollars?

A. I think so, yes.

Q. You think he would, and when would he begin to realize on his investment of two hundred thousand dollars?

A. That is problematical. With the present day development in plastics it might be much sooner than expected. From past experience we might say within fifteen years, he might begin to realize on his investment.

Q. Do you think he could realize enough in fifteen years to pay the returns on two hundred thousand dollars?

A. I think he might have an immediate realization by transferring it to some one interested in a long-time reforestation program.

Q. Have you ever operated a tree farm?

A. No.

Q. I think you said you are on the Joint Committee that approves these——

A. Yes, I am. [499]

(Testimony of Frank D. Hobe.)

Q. Have you ever turned down an application to somebody that wanted a tree farm—your committee?

A. I personally have recommended against some applications, but it has been the policy of our committee to be very lenient. To begin with, we have tried to encourage it rather than discourage, and to begin with, we do not like to turn down any applications. We are trying to make a start, and in the future it is going to become increasingly more difficult to get certification, I think.

Q. You haven't turned down any yet, though, have you? A. None that I know of.

Q. I think you said that under no great change in the market you can begin to bring that timber over this road and from the tree farm in fifteen years, is that right? A. That is right.

Q. Well, what timber would you be bringing out in the next fifteen years? What would it consist of, or at the end of fifteen years?

A. Well, it would probably be cordwood, cedar poles, fir piling.

Q. How many feet do you think would come out of it?

A. That depends entirely on market conditions. If it was cut for cordwood it would be quite a volume come out of it. [500]

Q. What do you suppose the cost would be of putting that timber on the road—that is, timber or cordwood, at that time?

A. I wouldn't have any idea.

Q. What do you think the taxes would be in the interim?

(Testimony of Frank D. Hobe.)

A. This is classified as reforested land. There wouldn't be any taxes until you cut it, except a nominal tax or per acre tax.

Q. At the end of that time, one-fourth—or what is that figure that goes for taxes, is that right, when you cut it you have to pay a proportion of the price you realize? A. That is right.

Q. You don't know what proportion that would be, do you, at the end of fifteen years?

A. I think it is twelve and a half per cent.

Q. Well, as a matter of fact, when we talk about how much timber is coming out, if it is timber, what the taxes will be, and how much it is going to cost to get it to the road—those things are all very speculative, aren't they, as to what the situation is going to be when you take out your first timber?

A. That is right.

Q. None of us can tell now what the situation will be. Do you think that a prospective purchaser would hesitate [501] because of those speculative elements? A. I don't think so.

Q. You don't think he would hesitate at all?

A. No.

Q. Well, have you considered the hazard of fire?

A. Yes, I have.

Q. And do you think a prospective purchaser would consider that?

A. Certainly he would consider that.

Q. And how about tree diseases, did you consider that?

A. With the exception of white pine you wouldn't consider that in this area.

(Testimony of Frank D. Hobe.)

Q. There is some white pine down there—I guess you call it diseased, now, isn't there?

A. Yes, that is right.

Q. And in this area? A. That is right.

Q. How about—is there some spruce in there?

A. Yes, there is.

Q. And is any of that diseased?

A. Well, I haven't examined the entire area enough to answer that. There may be some spruce bud worms working in that area.

Q. How about the danger of windfall?

A. That is a remote hazard. [502]

Q. Anybody paying $200,000 for that road would be making a wild speculation, wouldn't he?

A. I wouldn't consider it such.

Q. Would you buy this road for $200,000 if you didn't have any land adjacent to it, yourself?

A. I would give it serious consideration unless I thought I had better use for my money, I would. I would thoroughly consider it.

Q. You would buy this logging road with your own money for $200,000?

A. I think it would be a very good investment.

Q. Would you do it—suppose you only had $200,000 or $250,000, would you put $200,000 of it in this road?

Mr. Blair: Well, now——

The Court: I sustain the objection. Let's proceed.

Q. Is your figure higher for this road when—

(Testimony of Frank D. Hobe.)

your valuations of that date, when you consider the National forest timber to the north?

A. Yes, it would be higher than $200,000.

Mr. Keenan: It would be over $200,000. I think that is all. [503]

Redirect Examination

By Mr. Blair:

Q. Mr. Hobe, considering the Olympic National forest timber to the north, and all other elements that in your opinion would enter into the question of fair cash market value between an informed buyer and seller, what in your opinion was the fair cash market value of the property on October 22, 1943?

Mr. Keenan: Objected to.

The Court: Objection will be sustained, exception allowed.

Mr. Blair: That is all, Mr. Hobe.

(Witness excused.)

Mr. Blair: Now we have that offer of proof that I would like to make. This is a convenient time to do it.

The Court: I wonder if we couldn't go on now.

Mr. Blair: Yes.

The Court: Then we will make the offer of proof.

Mr. Metzger: Recall Mr. Forrest. [504]

LEN FORREST,

recalled as a witness on behalf of the Respondents, was examined further and testified as follows:

Direct Examination

By Mr. Metzger:

Q. You are Len Forrest who was previously sworn and testified in this case? A. Yes, sir.

Q. Mr. Forrest, prior to October 22, 1943, did you have any discussions with any of the officials of the United States National Forest Service, regarding the removal of timber from the Olympic National Forest, and the rate of such removal?

Mr. Keenan: If the Court please, the question is objected to. I think it is immaterial and irrelevant, and does not bear on any question of value in this case.

The Court: Objection will be sustained, and an exception allowed.

Q. Mr. Forrest, did you, in the period within a year or two prior to October 22, 1943—did you have any discussions with Ira J. Mason, Assistant Regional Forester of the United States National Forest Service regarding the use to be made of these roads which the government was taking or proposing to take? [505]

Mr. Keenan: If the Court please, that is objected to. The only issue here is valuation, and whatever discussions this witness had with Mr. Mason, the Assistant Regional Forester would have no bearing on the question of valuation in this case.

The Court: I think the objection will have to be sustained. Exception allowed.

(Testimony of Len Forrest.)

Q. Mr. Forrest, during the period indicated, did Polson Logging Company receive any communications in writing from the United States National Forest Service, indicating the rate at which the government proposed to sell timber in the United States National Forest, and transport it over this road?

Mr. Keenan: If the Court please, that is objected to, the rate at which the——

The Court: Objection will be sustained. Exception allowed.

Q. Mr. Forrest, the Bailiff is handing you an instrument marked for identification Respondent's A-14. Do you recognize that? A. Yes.

Q. Just tell the Court and jury what it is, without stating anything about its contents.

A. It is a letter from the Department of Agriculture, Forest Service, under signature of F. H. Brundage, Acting Regional [506] Forester.

Q. Addressed to Polson Logging Company?

A. Addressed to the Polson Logging Company.

Q. Under what date?

A. May the 13th, 1942.

Q. May the 13th, 1942? A. Yes.

Q. Does it relate to the roads in question here?

A. Yes, it does.

Q. And to the use proposed to be made thereof by the government?

Mr. Keenan: If the Court please, that is objected to.

(Testimony of Len Forrest.)

The Court: I think the letter would be the best evidence of what it relates.

Q. Do you recognize the signature on that letter?

A. Yes, sir, I have seen the signature many times.

Q. That is the signature of Mr. Brundage?

A. That is correct. At least, that is my opinion.

Q. And he was at that time, as far as you know, Acting Regional Forester?

A. Yes, that is right.

Mr. Metzger: We offer the letter.

Mr. Keenan: I would like to see the letter.

The Court: It will take some little time [507] to read this, and I assume you want to read it through and that will take the rest of the five minutes, so I am going to excuse the jury now to report back here at 1:30 this afternoon, and the Court will remain in session for an offer of proof.

(Whereupon the jurors retired from the court room.)

The Court: Have you examined that sufficiently now to know whether you want to object?

Mr. Keenan: I am going to object to it, your Honor. It is a discussion of an offer of compromise.

The Court: But I want to take this time primarily to make your offers of proof that you suggested you wished to make.

Mr. Blair: Yes. With respect to that letter, your Honor, the immaterial part—we will later

offer separately the statement on the second page that it is the policy of the Forest Service to log that area at the rate of twenty million feet a year. That is the only part that we claim is material.

The Respondent offers to prove by the witness Hobe that the market value of the property under condemnation, arrived at between an informed buyer and an informed seller, would have been affected by, and they would have given consideration to, among other [508] things, that the road under condemnation provides the best and most practicable route for moving to market approximately one and one-half billion feet of mature timber in the Humptulips watershed area of the Olympic National Forest; that the Forest Service contemplated, and that it was a reasonable expectation, that the annual log production from that portion of the Olympic National Forest in the Humptulips basin, which would normally and in reasonable expectancy—strike the words "normally" and "reasonable"—was at the rate of twenty billion board feet per year; that there are other routes over which roads could be developed to remove this timber, including a road into the timber from Highway No. 101 to the west at a point northerly of the township line between Township 21 north and 22 north, and running thence easterly, but that this route would be more expensive to construct and to operate over than the road under condemnation; that had the witness given consideration to these factors and to all other factors which in his opinion

would be given consideration by such informed buyer and seller, as of October 22, 1943——

The Court: Is that your offer?

Mr. Blair: I have just one more phrase, your Honor—in his opinion, considering all such [509] factors, the fair, cash market value of the property on that date was in the sum of three hundred thousand dollars.

Mr. Keenan: I object to it, your Honor, on the grounds that it is incompetent, irrelevant and immaterial, because it takes into consideration the needs of the government and the probable use in the future as a toll road, to exact a toll on timber sold by the United States.

The Court: The Court sustained the objection on the grounds broader than yours, Mr. Keenan; that it is contingent, that may or may not happen; that it is remote and speculative, and I therefore shall sustain the objection. Did you have another offer of proof?

This letter, I shall have to sustain the objection to its admission, but it will remain, of course, as a part of the record in the case.

Mr. Metzer: Well, we offer to prove by the witness Len Forrest who has been sworn, that prior to October 22, 1943, Ira J. Mason, then the Acting—or then the Assistant Regional Forester for the United States National Forest Service, and Mr. F. H. Brundage I think is the man who signed this letter—in any event, the Acting Regional Forester, stated to the officers [510] of the Polson Logging Company on different occasions that the United

States National Forest Service planned and proposed to cut and remove—to sell for cutting and removal, not less than twenty million feet of ripe and mature timber in the drainage basin of the Humptulips River lying immediately north of the lands in question in this suit, and to remove that timber by means of those roads. I think that is all.

The Court: Your offer does not go any farther than that?

Mr. Metzger: No.

The Court: That there would be a revenue or a toll charged for the timber hauled out over the road?

Mr. Metzger: My offer simply goes to the fact as to the rate of removal and the method of removal.

Mr. Keenan: If the Court please——

The Court: The offer will be denied and an exception allowed.

Mr. Metzger: You will allow us an exception?

The Court: Yes. Now, if that concludes all the offers, I would like to have counsel state to the Court in the absence of the jury, because I must prepare instructions so that I will be ready when we conclude this case—I would like to be advised now if it [511] is intended to raise the issue of severance damages, because the Court is going to have to instruct the jury on that and should be advised now. If that is going to be eliminated from the case, why, of course, I can eliminate it from consideration in my research.

Mr. Blair: We do not expect to put on any wit-

ness who will testify to severance damage, your Honor.

The Court: Then any issue of severance damage is not in the case.

Mr. Metzger: I think Mr. Blair's statement is correct, but I may say in entire fairness to the Court one of the questions involved has been your Honor's ruling on the character of this proposed taking, which for the purposes of this trial and this Court we are more or less bound by it. I should not say "more or less"—I apologize—which we are bound by. Of course I did not mean that; that that question of character of the taking which your Honor has ruled on.

The Court: Why I am concerned with the question, if severance damages involves itself in the question—then I am convinced that the question of benefits immediately arises.

Mr. Metzger: As Mr. Blair says, we will offer no testimony. [512]

The Court: And if severance damages are not in the case, I do not know that the benefits can then be included in the jury measure—in the award. I notice the instructions that have been submitted by the Government in this case seem to be based upon the theory that there is going to be some proof of severance damages.

Mr. Keenan: We have no intention of proving severance damage, your Honor. Here is the situation; you either have to appraise this road just as a road without relation to tree farms and one thing or another, and a fair cash market value of those

streaks up there through the map, or you have got to appraise it for severance damages, as I see it.

The Court: That is the difficulty that you present in this case as distinguished from the taking of a block of land. This has a potential and possibly special value, as distinguished from going out and taking a man's farm, and must be considered from that angle. Of course if the Respondent says that he is not injured to the other remaining twelve thousand acres that he has, that is split apart by the crossing of this road, why then the Court would not instruct them on that issue.

Mr. Keenan: I appreciate that, your Honor, but they do talk, however they may word it, they are talking in terms of severance damage here. There isn't any other way to speak of it.

The Court: That is the reason why the Court asked the question whether the issue of severance damages is coming into the case. If this is a public highway with such restrictions as the Forest Service places upon it, then of course the tree farm would not be damaged to any extent, but generally speaking, quite extensively benefitted by having a well constructed and maintained highway for fire protection purposes and the other, hauling in and out; but it would likewise, if it can be shown to the jury that deprivation of exclusive control becomes an injury or damage, would be an item that would be proper to go to the jury, and it gets you immediately into the field of severance damage, and with the statement of counsel for the Respondents that they do not propose to make any offer of proof, or

to make any claim for severance damage, why of course the Court will eliminate that.

Mr. Metzger: That is all right.

Mr. Keenan: Well, I am merely raising the point at this time that counsel's statement is not enough. I do not want to be misunderstood. I am not criticizing counsel, because I think the element of severance damage is going to be in this case, if not [514] already, through Respondents' witnesses by another name.

Mr. Blair: If you though there was severance damage you should have offered testimony. We are not going to prove it.

The Court: Well, I am inclined to believe as far as the burden goes in connection with severance damage, it rests upon the landowner rather than upon the taker, but I have ruled that the burden rests upon the government to show that there is some compensation due to the owner for the lands that he has lost, and that is why I compelled the Government to go forward with the burden, and if you were to assume the absurd situation that this other twelve thousand acres of land would be doubled in value by reason of having a maintained highway through it, there still would be no judgment in favor of the taker—it still would require an instruction that the jury must return nominal damages, even though benefits far exceed it.

Mr. Keenan: I appreciate that, your Honor.

The Court: Well, I think that probably clears the matter up.

The Court will be at recess now until 1:30 this afternoon.

(Recess.) [515]

1:30 o'clock p. m.

The Court: Have you finished with the witness?

Mr. Blair: Yes, I believe in view of the record, we have.

The Court: All right then, you may proceed.

Mr. Metzger: At this time, Your Honor please, we offer in evidence Declaration of Taking, made by Claude R. Wickard, Secretary of Agriculture of the United States, under date of April 21, 1942, and filed in this Court October 22, 1943, exclusive of Paragraph V thereof.

Mr. Keenan: If the Court please, I think possibly an argument may follow this motion, and should be made outside of the presence of the jury.

Mr. Metzger: This is an offer of evidence.

Mr. Keenan: Any offer I think should. I don't understand the Declaration of Taking is admissible in any instance in one of these cases.

The Court: I don't either.

Mr. Metzger: I offer it for a statement of it. as an admission by the Government of the purposes for which this land is taken, being required by law to be stated and being stated in the Declaration

The Court: The offer will be denied and an exception allowed, Mr. Metzger.

Mr. Metzger: Then I offer similarly—I offer in evidence the Declaration of Taking executed by

Paul H. Appleby as Under Secretary of Agriculture, November 2, 1943, and filed in this Court November 12, 1943, with the exception of Paragraph number V. thereof—these two Declarations of Taking.

The Court: What is Paragraph V?

Mr. Metzger: V. is the one which relates to the amount.

The Court: Oh.

Mr. Metzger: The amount which I am not——

The Court: The offer will be denied and an exception allowed.

Mr. Metzger: Yes, you have allowed us an exception?

The Court: Yes.

Mr. Metzger: Respondent rests, Your Honor.

Mr. Keenan: No rebuttal.

The Court: How much time do you want to argue?

Mr. Keenan: I think an hour to open and close.

Mr. Blair: Accept that. [517]

The Court: The Court is going to have a little time because it did not anticipate—to get this charge to the jury, so I am going to allow you an hour and fifteen minutes if you desire to take it, but that will be the outside time, and then that will take pretty much of the day, and I will try and be prepared in the morning, and then you may proceed with the argument.

(Whereupon, argument by counsel representin the government.) [518]

The Court: Now, gentlemen of the jury, both sides having presented their evidence in this case and the government having made an opening argument, and the Respondent having waived an argument, we have reached the stage in the case where it becomes the duty of the Court to instruct you as to what the law is in this case.

It is your duty to accept the law as the Court gives it to you. The Court itself has no responsibility whatever in finding the facts in this case. That is your responsibility exclusively. Anything that I may say that would indicate to you what my views are concerning the facts, is not to be taken as binding upon you, because your responsibility is to find what the facts are. Mine is to charge you what the law is, and your duty in weighing and considering the evidence in this case is to apply the law as the Court gives it to you, whether you believe it is [519] right or not, but it is your sworn duty to accept the law as the Court states it is. If I make an error in connection with the law, or, a number of errors, they are subject to correction by a higher court. If you make an error in connection with the facts, there is no provision made to correct them.

Now this is a case that we commonly call a "condemnation case," or an "eminent domain proceeding." Under the Fifth Amendment of the federal Constitution, it is provided that private property of any person may be taken for a public use, but it can only be taken upon the payment of just compensation to the owner. You will notice from

this provision of the federal Constitution that a private owner is entitled, when his property is taken for public uses, to just compensation. The government of the United States possesses what is known in law as the power of "eminent domain," which means that in the exercise of its legitimate powers and functions and sovereign rights it may take the private property of any individual whenever such property is necessary for a public use. In the exercise of that power, the government institutes an action which is commonly called a "condemnation proceeding," whereby it acquires title to the property of the individual involved, upon condition that it pay just compensation for such property. The owner of [520] the property is entitled to have the value of the property which is taken from him, fixed by the judgment of a jury of his peers. He is not to be penalized because he insists upon the rights which the law confers upon him. It is his privilege to submit this issue to a jury, and you are not to be in any way prejudiced against the owners in this case because they availed themselves of the privilege which the law expressly confers upon them. The owner of the property may negotiate with the government and arrive at a satisfactory private sale outside of court, but when he does not do so, he has a right to have the issues submitted to the jury, just as is being done in this case. The property involved in this case has been taken by the United States for a legitimate public use, and the right of the government in so taking it is in no way involved in your deliberations.

"Just compensation" in the laws referred to, means market value, and it includes all of the elements of value that inhere in the property. The market value is to be determined in this case in accordance with what you think would have been the amount which would have been arrived at on October 22, 1943, by fair negotiations between an informed and reasonable owner, desiring to sell, but under no necessity to do so, and an informed and reasonable purchaser, desiring to buy, but under no necessity to do so.

The sum which the law requires the government [521] to pay to the owner does not depend upon the use to which such owner may have devoted the land, but it is to be arrived at by taking into consideration all of the uses for which the property is reasonably and practically suitable and adaptable. The highest and most profitable use for which the property is reasonably and practically adapted is the criterion by which its market value is fixed.

In determining the value of the lands taken in this case, you will give the same considerations that you would take into account and that you would consider in a sale made between private parties. The inquiry in this case is: What was the property worth in the market on the 22nd day of October, 1943, viewed with reference to the use to which it had been put at the time of the taking, and with the possibilities that it had in the reasonably near future.

In thus determining the value of the property here, you will not take into consideration anything

with respect to capabilities or uses of the land to which it could have been put or adapted, which are remote, imaginary, vague or speculative. Neither are you to consider any value that might be suggested for the land in exceptional or unusual instances which do not exist, and which do not tend to show the fair market value of the land.

Another way of stating what would constitute [522] a fair market value of the lands taken and be just compensation to the owner, after giving consideration to all of the circumstances disclosed by the evidence, would be to ascertain what the owners could have gotten for the land, being fully informed of its value, but offering it in the open market for cash, on the date when it was taken; that is, the amount that in all reasonable probability would have been arrived at by fair negotiations between an informed owner, willing but not compelled to sell, and an informed buyer, willing, but not compelled to buy. In arriving at that value you shall take into account all the consideration as disclosed by the evidence which may fairly be brought out and reasonably given substantial weight by well-informed men engaged in such negotiations and bargaining. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public use, that it is impossible to formulate an exact rule to govern its appraisal in all cases, but the general rule, as has already been stated to you, is that just compensation to the owner is to be determined by reference to the uses for which the property is

reasonably and practically suitable and adaptable, having regard to the existing business or wants of the community, or such as may reasonable be expected in the near future.

In this case it is for you to determine as [523] one of the questions in order to arrive at the value of the property taken; what in all reasonable probability was the highest and best use to which the lands could have been put when they were taken by the government? As I have already stated to you, you will not take into consideration anything with respect to the capabilities or uses of the lands to which they could have been put, which would be remote, imaginary, vague or speculative, and which does not appeal to your good judgment as prudent men.

In this case it is the contention of the government, which is taking the property, that its highest and best use as between private individuals at the time of the taking was for growing timber thereon. It is the contention of the owner that the highest and best use of the property was for a truck road, each claiming that its value should be fixed by you, based upon their respective contentions. You will have to determine what, in fact, was the highest and best use of this property, and then you will find its value.

Potential uses of this property can not be considered by you insofar as they apply to or depend upon any uses to which the government itself may put the property after having acquired it. If, in this case, you find the highest and best use of this

property is for truck or road purposes, then you will take into consideration the wants or [524] needs as such may reasonably be expected in the near future by those who would make use of the property, but not including in such wants and needs the hauling of any forest timber and products which were not sold or marketed on the day the government first took possession of the property here in question.

In regard to the time when the government took possession of this property, you are instructed as a matter of law that it acquired fee simple title to the property on October 22, 1943. You will understand also that in determining the fair cash market value of the property here in question, when it was taken, you can not take into account any special value that it may have to the government, but you must fix its fair cash market value independently of any such special value that it has to the government.

The market value of the property is the price that it would bring when it is offered for sale for cash by an informed person, who desires but is not compelled to sell, and is bought by an informed buyer, who desires to buy but is under no necessity to purchase.

It is not the value of the property that the owners may place upon it that you are to accept, though you will give consideration to the owners' testimony as to what they state the value to be. Damages can not be increased because of the owners' unwillingness to sell, or for any [525] sentimental attach-

ment that the owners might have for the property. It is the full, fair cash value of the property as of the date when it was taken that is to be determined by you.

The necessities of the government in acquiring this property must not be taken into consideration, nor must any unwillingness to sell the property by the owners be taken into consideration by you in your deliberations. The price to be fixed by you for the land here in question is the price which a reasonably prudent and careful man, having a knowledge of values in the locality in question, and the conditions as they prevailed there on the date in question; that is, October 22, 1943, would be willing to pay for these properties, having such use or uses in view for the properties as to which they are best adapted, or if he were the owner of the property, the sum for which he would be willing to sell, he being under no necessity to sell.

In determining the fair market value of the property herein involved, you will not permit yourselves to be in any way influenced by the character of the purchaser herein, being the government of the United States, nor will you permit yourselfs to be influenced in any way by the character of the respondents, being the Polson Logging Company, a corporation, nor will you take into account any unwillingness on the part of the respondents to part with their property. [526] You will determine the fair cash market value of the property to be paid by the government as just compensation, pre-

cisely as you would a transaction between private individuals, not compelled to buy nor sell.

Market value does not only mean what a person would be willing to pay for the premises, having no necessity for buying them, but there is the added condition that it must also be such a sum as a person, who is under no obligation to sell, is willing to take.

Therefore, in arriving at the market value here, you must arrive at such a sum as would be agreed upon by a willing seller, who is under no necessity to sell, and a willing buyer, who is under no necessity to buy.

Compensation must be reckoned from the standpoint of what the land owner loses by having the property taken, not by any benefit that the government gain by taking it.

The question for you to consider is this: If the respondents had desired to sell the property taken from them by the government, but were under no necessity to do so, what could they have obtained for it upon the market on October 22, 1943, being allowed a reasonable time in which to find a purchaser, who was buying with a knowledge of all the uses and purposes to which the property was reasonably and practically adapted? [527]

And in that connection, I instruct you again, as I have heretofore, and probably shall further, that when the uses of this property was taken into consideration by the prospective buyer and prospective seller, those uses can not include any earnings that the property may make by reason of having trans-

ported thereover any timber that grows in the national forest that may be contiguous to it, or within the watershed.

Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because the owner at the particular time is not actually putting it to its most valuable use, or even unable to use it for the time being. Others may be able to make a use of it that would subserve the necessities or conveniences of life or business. Its capability of being put to its highest and best use gives it such market value as you must determine.

In determining the amount of just compensation to be awarded, as I have already stated to you, and shall repeat the inquiry, is; not "What has the taker gained?" but rather "What has the owner lost?" You should not consider the need, if any, of the government for the property taken, nor the value of such property to the government upon its acquisition. However, if you find that this property here has a special utility or availability value not only to the [528] government, but to others, then such utility or availability value should be considered by you in connection with what you find a purchaser would pay for the property.

In this proceeding the sum that you award as just compensation must be measured by what the government has taken from the Polson Logging Company, and not by the use to which it puts the property. The amount of compensation allowed can not be diminished by any expectation or possibility

that the government may at some future time or from time to time permit the respondent to use the property taken, either gratuitously, or upon the payment of a charge.

In determining the just compensation to be paid for the taking of this property, you will not take into consideration any timber owned by anyone except the respondent, Polson Logging Company, in the use of the lands taken as a truck logging road. Any special value that the road may have to the government for use in connection with its national forest must be excluded by you as an element of market value. The fact that there is a large stand of national forest timber which may be logged in the future and hauled out over this road must not be considered by you as an element of damage; therefore, in considering this case, no allowance may be made for any value that a prospective purchaser would place upon this land as a road over which the government owned timber would necessarily move. [529]

You can allow only such value for the lands taken which you believe a private purchaser, acting as a reasonably prudent person, and being an informed man, would pay for it, knowing that he could not anticipate any earnings or revenues that he might derive by reason of the national forest timber which is in the Humptulips Watershed. The fact that the government has utilized this grade in the construction of the present road, is in no way to be taken by you to increase the compensation to be paid to

the respondent company, and that circumstance will have no place in your deliberations.

You are the sole and exclusive judges of what are the facts in this case, and of the weight and credit to be given the testimony of each witness who has testified before you. You will take into consideration the conduct, appearance and demeanor of each witness while testifying before you; and the opportunity or lack of opportunity on the part of any witness of knowing or being informed concerning the matters about which he testifies; the interest or lack of interest on the part of any witness in the outcome of this case, and all the facts and circumstances attending and surrounding the witness, as disclosed from the witness stand, and in the light of all these considerations, you will give to the testimony of each witness that fair, reasonable and common sense weight and value which you, as practical men, versed in the ordinary affairs of life, consider it justly [530] entitled to receive at your hands, and no more.

Where witnesses qualify as experts in a particular field of knowledge or learning, and are called to the witness stand and allowed to express opinions, rather than testify to facts, those opinions are for the aid and assistance of the jury, but not for the purpose of invading its functions. The responsibility to decide rests upon the jury, but it is your duty to evaluate it and appraise the testimony of a witness who expresses opinions, precisely as you would evaluate and appraise the testi-

mony of witnesses who testify to facts within their personal knowledge, and it is for you, in the light of all the circumstances disclosed during the progress of the trial, to place that weight upon and give credit to the testimony of each witness which you conscientiously believe, in the exercise of sound judgment and good sense, it is fairly entitled to receive at your hands.

You should consider the care and accuracy with which the various experts respectively determined the data upon which they base their conclusions. If one or more of the experts seemed to the jury to use more specific and accurately obtained data for their estimates and to give more satisfactory reasons for their conclusions, the jury may give more credence to that expert or those experts and his or their conclusions. You are not bound by any expert [531] testimony, but it should be considered by you in connection with the other evidence in the case.

In this case I instruct you that what is just compensation must be established by a fair preponderance of the evidence. By a "fair preponderance of the evidence" is meant the greater convincing force or weight of the evidence. It is that which turns the scales, which, before its introduction, were evenly balanced. Fair preponderance of the evidence means the greater convincing force or weight. It is that which appeals to you as being the more cogent, the more reasonable, and the more probable. It is not necessarily determined by the

greater number of witnesses testifying on one side or the other of an issue.

In determining what constitutes a fair preponderance of the evidence, you will give consideration to the testimony introduced both on behalf of the government herein and that on behalf of the respondents, and from such consideration, together with all of the other facts and circumstances disclosed at the trial, you will determine what would be just compensation to be awarded to the respondents herein.

You are instructed that in arriving at your verdict you are not permitted to add together different amounts, representing the respective views of different jurors, and to divide the total by twelve or some other figure, intending [532] to represent the number of jurors or ideas represented; any such would be a "quotient verdict," would be contrary to law, and would be in violation of your oaths. You are, of course, to give consideration to each other's views and reasoning and honestly endeavor to reach a verdict, but such common agreement is to be based upon the final honest belief of the jurors, and must not be arrived at by that mechanical process of addition and division which constitutes a quotient verdict.

When you retire to your jury room to deliberate, it will be your duty to select one of your number as foreman to speak for the jury when called upon by the Court to do so. It will require the entire twelve of your number to arrive at a verdict. There will be submitted to you a form of verdict, which

will have thereon a blank in which you will write the amount that you conclude is just compensation in this case. The verdict under the law must be a verdict for the respondents, the landowner, the amount in which it should be. The amount that must be found is your responsibility.

You will not have the pleadings in this case, with you, but you will have all of the exhibits which have been offered in evidence.

Now in conclusion, let me say to you that it is your duty to weigh the evidence calmly and dispassionately, to regard the interests of the parties to this action as the interests of strangers, to decide the issues upon the merits, and to arrive at your conclusion without any consideration of the financial ability of the one or the necessities of the other, and without regard to what effect, if any, your verdict may have upon the future welfare of the parties.

You will not permit sympathy or prejudice in favor of or against either party or their respective attorneys to have any place in your deliberations, for all persons are equal before the law, and all are entitled to exact justice.

I think I perhaps should add to you that certain things took place during the progress of this somewhat extended trial, wherein objections were made at times, wherein the Court overruled or sustained them, and wherein remarks were made by the respective parties and statements made by the Court, are all matters to be excluded by you in your deliberations, because they dealt with the

responsibility of the Court and not the jury, and wherever the Court instructed you to disregard the testimony of any witness upon granting a motion to strike, it is your duty to do so. [534]

The Court: Are there exceptions or objections that you desire to take in the absence of the jury?

Mr. Blair: The parties stipulated that we take such as we may have in the absence of the jury.

The Court: Very well, the jury then may pass to the jury room, and I think——

Mr. Keenan: I have one suggestion. We submitted a form of verdict. I don't know whether that is the one that is going to be submitted to this jury or not.

The Court: I take it that it is.

Mr. Keenan: It says in about the fourth line from the bottom "Ozette Railway Company" and it refers to the right of way over a state owned section. Since this verdict was prepared, one of the Polson Logging Company witnesses, Mr. Forrest said that is now owned by the Polson Logging Company so I suggest that Ozette Railway be scratched out, and Polson Logging Company be inserted.

The Court: Do you have any objection?

Mr. Metzger: No.

The Court: And I shall initial that part of the form of verdict so as to—now the jury may retire to the jury room, and if the Court, after hearing these objections and suggestions decides that they are of such a nature that he further wants to give them to the jury, I will call you back in, but you may now retire. The bailiffs will be [535] sworn.

(Whereupon bailiffs were sworn, after which jurors retired to deliberate upon their verdict.)

The Court: Now I will hear from you, Mr. Keenan.

Mr. Keenan: If the Court please, the Petitioner, United States of America, would like an exception to the Court's failure to give the Petitioner's requested instruction number twenty-two. That is the one that was handed to Your Honor today.

The Court: Yes, your exception will be noted, and I will state to you my reason for not giving it. There was no issue here of severance damage whatever, raised by either party.

Mr. Keenan: Of course, it is the government's position, Your Honor, that this instruction would be proper in any event, whether there was any severance damage. It is simply one saying they could use the word. It does not mention whether they would pay a toll or fee of any kind.

The Court: I take it under the theory—and of course I made these decisions rather hastily because I was not advised you were going under the theory of the government fixing only land value, and no other value being fixed. So far as they were concerned, then there could be no offset by [536] benefits.

Mr. Keenan: In this instruction I did not intend it as an offset for benefits. It simply goes as far as, I believe you Honor, in saying just compensation being paid to the Polson Logging Company, you should take into consideration the fact that said respondent, Polson Logging Company, has the right to use said highway as a member of the general public,

and there have been statements made in this record that might—by some of the witnesses, might lead to the inference——

The Court: I am going to allow you an exception.

Mr. Keenan: The government would like an exception to the Court's failure to give the petitioner's requested instruction number five, which reads:

"The Respondent, Polson Logging Company, has the burden of proving the just compensation to which it is entitled by the fair preponderance of the evidence."

The Court: You may have an exception.

Mr. Keenan: And the government would like an exception to the Court's instruction to the jury that their verdict would have to be unanimous, that all of the jurors would have to join in the verdict.

The Court: Upon what do you base that exception? [537]

Mr. Keenan: The fact that the procedure in that regard, is in my opinion, the state procedure stated. There was no such thing as a condemnation case at common law, as I understand the common law rules would normally apply. There are some States in the United States where a jury is not used to fix compensation in condemnation cases. It is done by commissioners, sometimes, and very often reviewed by the Court sitting without a jury. I do not understand the federal law, applicable to civil cases, and to the number of jurors that must join in the verdict, has any application to a case such as this.

The Court: It has always been my understanding that it has, and I am willing to leave that instruc-

tion stand, and in case it is appealed, you might get that settled. I think the State law applies when there is nothing in the federal law to cover the situation. I have found no federal case anywhere where it allowed a jury of nine or ten.

Mr. Keenan: I understand there was a good deal of confusion. Judge Schwellenbach was on the bench——

The Court: Anything further?

Mr. Keenan: And the government would like an exception to the government's requested instruction number twenty-one, in which it is said:

"You are instructed——"

The Court: You mean the failure to give. [538]

Mr. Keenan: The failure to give the government's requested instruction number twenty-one. It was given in part, but not the whole. The Court failed to give "you are instructed that you must bring in as a verdict such amount as ten of you agree upon as your own conclusions and findings", and of course the government's reasons for this exception are identical with those cited in connection with the last exception.

The Court: Yes.

Mr. Keenan: I think that is all, your Honor.

The Court: Mr. Blair or Mr. Metzger?

Mr. Metzger: If Your Honor please, Respondent Polson Logging Company excepts to the instruction given by the Court——

The Court: I wish you would take up, if it does not break into your line of authorities, first the in-

structions requested, and then those that I failed to give.

Mr. Metzger: All right, Your Honor.

The Court: It would be a little more orderly to me, in the manner in which I have been proceeding.

Mr. Metzger: If Your Honor please, the Respondent Polson Logging Company excepts to the Court's refusal to give its requested instruction No. 3—— [539]

The Court: For your information I might state that in a general way I refused to give your instructions 1 and 2, and I mention that because you haven't the advantage of having them before you. 1 and 2 were covered in part, but they were refused, too, in the major part.

Mr. Metzger: Yes. We are not taking any exception, because those two in substance Your Honor wove into thought, elsewhere.

The Court: That deals with severance, and severance is out of this case.

Mr. Metzger: Yes, but we except, as I said, to your refusal to give instruction No. 3.

The Court: As submitted.

Mr. Metzger: And particularly the refusal to give to the jury either in that instruction or in any of your instructions, the law that the jury must consider and determine the value of the property in the light of any special or higher use for which it may be available, in connection with other properties, if they find from the evidence that there is a reasonable probability of such connection in the reasonably near future. That I believe is the law as

laid down by the Supreme Court of the United States in the Powelson case [540] cited to the Court with that instruction.

The Court: Your exception will be noted. The Court takes the position it gave in substance the instruction as requested, but in its own language.

Mr. Metzger: When "noted", that means an exception is allowed?

The Court: Exception is allowed.

Mr. Metzger: We accept to the refusal of the Court to give our—Respondent's requested instruction No. 8, which is an instruction stating the law of this state as laid down by the Supreme Court of the state in the case of the Montana Railway Company vs. Roeder, 30 Wash. 240, which was cited to the Court with the instruction. Is that exception allowed, Your Honor?

The Court: The exception is allowed, yes.

Mr. Metzger: We except to the refusal of the Court to give Respondent's No. 9, and particularly to the refusal of the Court to instruct the jury in any part of his instructions that if they find that the property has a special utility or availability, not only to the government but to other parties who could use it for the particular purpose intended by the government, then such utility or availability should be considered by them in arriving at just compensation,—believing that to be the law under the authorities cited to that [541] instruction.

The Court: Your exception will be noted and allowed, Mr. Metzger.

Mr. Metzger: We finally except to the refusal

of the Court to give that part of requested instruction No. 11—I say Respondent's requested instruction No. 11, that damages must be assessed in this proceeding once and for all, no such instruction having been given.

That is all of our exceptions to requested instructions. No—we also submitted an additional instruction No. 13, which I—is that before Your Honor?

The Court: I don't know. I have No. 12.

Mr. Metzger: I submitted another one.

Mr. Blair: We have no exception to it.

Mr. Metzger: If Your Honor please, in connection with that instruction, I submitted it for the purpose of—did not expect Your Honor would give it, because—well, I submitted it for the purpose of making a record on its refusal, and I do not think Your Honor needs to examine it, so I take an exception to the refusal of the Court to give Respondent's instruction 13.

The Court: Your exception will be noted and allowed. Now then, as to the instructions given. [542]

Mr. Blair: The Respondent excepts to the instruction of the Court where the Court instructed the jury variously, in four portions of the instructions, upon the same subject, substantially.

In the first instance, the Court told the jury substantially that in considering the uses to which the property might be put and for which it might be available, they should not include in or consider the hauling of any forest products not theretofor sold by the government on the date of taking. To that instruction we except, because of our position here-

tofore stated throughout the trial that we believe the buyer and seller reasonably informed, would have considered the existence of that forest, and the fact that the government program called for, and in all reasonable expectation there would have been a cut from the forest of twenty million feet, and that would have furnished a traffic over the road which would have returned compensation to the owners of the road, and that those things reflect the market value of this road on October 22, 1943, and would have been given consideration by a buyer and a seller.

The Court: Your exception will be noted and allowed.

Mr. Blair: For the same reason we except [543] to the later charge of the Court upon the same subject, where the Court told the jury that the jury could not include in the uses of the road to be given consideration, any earnings from timber in the national forest. For the same reason,——

The Court: Yes, go right ahead.

Mr. Blair: For the same reason we further except to the subsequent charge to the jury that no consideration should be given or allowance made for any value in the road taken, because of the government owned timber that might or would move over the road.

The Court: Exception may be noted and allowed.

Mr. Blair: And for the same reason we except to that portion of the jury's charge where the Court charged the jury in substance that they should not consider any earnings from timber in the United

States forest, and particularly that part thereof constituting the Humptulips River watershed.

The Court: You are not excepting to the fact that I used the "Humptulips Watershed", but as it applied to forest timber?

Mr. Blair: That is correct.

We further except to that portion of the Court's charge to the jury where the Court charged the [544] jury in substance that they should not consider any special value of the property being condemned because of uses available to the government for that property, for the reason that the Court did not further charge the jury that if such uses were equally available to others, then they should be given consideration.

The Court: Exception may be noted and allowed.

Mr. Blair: Respondent further excepts to that portion of the Court's charge wherein the Court told the jury in substance that they should not take into consideration any timber owned by others than Polson Logging Company.

The Court: Yes, you may have an exception.

Mr. Metzger: I want one more. I would ask on behalf of Respondent a further exception to that instruction, wherein the Court advised the jury that the government acquired full title to this property on October 22, 1943, it being our position as heretofore stated, First, that the declaration of taking of that filing date, has heretofore been held null and void, and that order has not been—as to that effect, has not been set aside, and is the law of this case; and Secondly, that—— [545]

The Court: October the 22nd, 1943?

Mr. Metzger: Yes, that order——

The Court: I don't know that that order set aside——

Mr. Metzger: The order of November 12, held that declaration of taking null and of no effect. That order so holding has never been set aside.

The Court: Well, there were certain limitations in that order.

Mr. Metzger: I appreciate, Your Honor. I am again——

The Court: But you may make your record.

Mr. Metzger: I am making my record, Your Honor please, and for the further reason that the record in this case, neither the declaration nor the second amended petition in condemnation, shows any authority in the Secretary of Agriculture to acquire these lands, at all.

The Court: Your exceptions will be noted and allowed, Mr. Metzger.

Mr. Metzger: Thank you.

The Court: Now there is——

* * * *

Mr. Keenan: I would like to inquire—I [546] know it is slightly out of order, was an exception noted or allowed to each of my requests for exceptions?

The Court: Yes, they were allowed generally at the conclusion of your exceptions. They will be considered as allowed to each of them.

Mr. Metzger: May it be understood that your

statement as to allowance of exceptions applies to Respondent?

The Court: Yes, it will apply. There is no desire on the part of the Court to prejudice in the slightest, anybody, to have the Circuit Court review the issues here.

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,
Official Court Reporter.

[Endorsed]: Filed April 15, 1946.

[Endorsed]: No. 11342. United States Circuit Court of Appeals for the Ninth Circuit. Polson Logging Company, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed May 31, 1946.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11342

POLSON LOGGING COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL, AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Comes now the appellant, Polson Logging Company, and as its statement of points on which it intends to rely on appeal required in Paragraph 6 of Rule 19 of Rules of Practice of this Court, adopts the "Statement of Points on which Appellant Intends to Rely on Appeal," filed by appellant in United States District Court for the Western District of Washington, Southern Division, on April 15, 1946, and appearing in the certified transcript of record at page 102 thereof.

Appellant designates as the parts of the record which it thinks necessary for the consideration of the foregoing points and accordingly designates for printing the entire record on appeal as certified by the Clerk of United States District Court for the Western District of Washington, Southern Division, with the exception of the "Reporter's Transcript of the evidence and proceedings on the trial of the issue of compensation," appearing in said certified transcript of record at pages ... to ..., inclusive,

and except such other portions of the certified record on appeal as the parties to the appeal may stipulate shall be omitted from the printed record.

Dated this 27th day of May, 1946.

/s/ L. B. DONLEY,

/s/ F. D. METZGER,

/s/ METZGER, BLAIR, GARDNER & BOLDT,
Attorneys for Polson Logging Company, Appellant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 31, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE'S DESIGNATION OF ADDITIONAL PARTS OF RECORD TO BE PRINTED

The United States of America, appellee herein, designates for printing the following matter in addition to those portions of the record designated by appellant, Polson Logging Company:

1. The reporter's transcript of the evidence and proceedings of the trial on the issue of compensation had on November 12, 13, 14, 19, and 20, 1945, which transcript appears in the certified transcript of the record.

Dated at Seattle, Washington, this 31st day of May, 1946.

/s/ DAVID L. BAZELON,
Assistant Attorney General.

/s/ F. P. KEENAN,
Special Assistant to The Attorney General.
Attorneys for United States of America, Appellee.

[Endorsed]: Filed June 1, 1946. Paul P. O'Brien, Clerk.

No. 11342

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POLSON LOGGING COMPANY,
a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

Brief of Appellant

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FILED
SEP 4 - 1946
PAUL P. O'BRIEN,
CLERK

Ray Printing Co.—Tacoma

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CONSTITUTIONS, STATUTES AND RULES CITED —Continued

TEXTBOOKS CITED

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POLSON LOGGING COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JURISDICTIONAL STATEMENT

The action is one in eminent domain instituted by the Attorney General of the United States at the request of the Secretary of Agriculture under Chapter 728 of the Act of August 1, 1888, 25 Stat. 357, as amended, 40 U.S.C.A. Section 257. By its initial pleadings, the government sought to acquire an easement in certain lands in the State of Washington lying wholly outside the exterior boundaries of the Olympic National Forest as a means of access to and for the removal of timber in said forest. By subsequent amendments, the purpose or scope of the action was enlarged to include the acquisition in

fee of the lands over which an easement only was originally sought as well as the acquisition of certain other or additional lands. (See letters of Secretary of Agriculture to Attorney General dated January 8, 1942 (R. I, 13), April 21, 1942 (R. I, 45), and November 2, 1943 (R. I, 79), petition in condemnation (R. I, 2), amended petition in condemnation (R. I, 47), and second amended petition in condemnation (R. I, 92).)

On May 23, 1944, the District Court entered judgment (R. I, 108) on the third declaration of taking, which had been filed November 12, 1943 (R. I, 82). Polson Logging Company's appeal to this Court from said judgment was dismissed on the ground that "such a judgment was not a final decision." *Polson Logging Company* vs. *United States,* 149 Fed. (2) 877.

Following the return of this Court's mandate, the court proceeded to trial by jury of the issue of just compensation and, after denial of a motion for a new trial (R. II, 296), judgment was entered December 19, 1945, fixing compensation in accordance with the jury's verdict and decreeing that title was vested in the United States free and clear of all claims and encumbrances whatsoever (R. II, 299). Notice of appeal and bond for costs on appeal were filed March 18, 1946 (R. II, 306-307).

Such judgment is final and appealable. *Polson Logging Company* vs. *United States,* 149 Fed. (2) 877; *Catlin* vs. *United States,* 324 U. S. 229, 65 Sup. Ct. 631, 89 L. Ed. 911.

The jurisdiction of the District Court is based upon 28 U.S.C.A. Section 41 (1), 40 U.S.C.A. Section 257.

The jurisdiction of this Court is based upon 28 U.S.C.A. Sections 225 and 230 and Rule 73 of the Rules of Civil Procedure.

STATEMENT OF THE CASE

By the original petition in condemnation (R. I, 2) and the original declaration of taking (R. I, 16) filed January 21, 1942, the government sought to acquire an easement in or over certain strips of land 100 feet wide following the course of logging railroad grades constructed by appellant, Polson Logging Company, and extending from a junction with Olympic National Highway in Section 35, Township 21 North, Range 10 West of the Willamette Meridian, northeasterly across Township 20, Range 9 West of the Willamette Meridian, to the south boundary line of the Olympic National Forest. Following such filing, the District Court on the application of the government but in the absence of the respondents named in the petition in condemnation and without

any notice to any of them entered judgment on said original declaration of taking (R. I, 23). Polson Logging Company, who will hereinafter be referred to as "appellant," promptly upon hearing of such action appeared in the cause and moved to vacate, set aside or otherwise adjudge null and void said judgment upon the ground that the declaration of taking, upon which it purported to be based, wholly failed to show that the Secretary of Agriculture had any authority to acquire the lands described in such judgment, that he, in fact, did not have any such authority, and that said judgment constituted a taking of the property of appellant without due process of law and was therefore contrary to and violative of the due process and eminent domain clauses of the Fifth Amendment to the Constitution of the United States and the Ninth Amendment to the Constitution of the State of Washington (R. I, 32). After being served with notice and summons, appellant demurred to and moved to dismiss the petition in condemnation upon the same grounds (R. I, 35). Hearing of those motions was continued from time to time pending negotiations between appellant and officials of the United States National Forest Service looking to an amicable settlement of the matters involved in the proposed taking (R. I, 38-44). These negotiations having proved abortive, the government on October 22, 1943, filed an amended petition in condemnation (R. I, 47) and a second declaration of

taking dated April 21, 1942 (R. I, 60) whereby the government sought to acquire fee title to the lands over which it had previously sought an easement only, and also fee title to certain additional lands, *all of which were and are wholly outside the Olympic National Forest.* No judgment on said second declaration of taking was applied for but appellant moved against it, both orally and in writing, in the same manner as it had moved against the original declaration of taking.

After extended argument involving several days of hearings, the District Court sustained appellant's motions and on November 12, 1943, made and entered an order adjudging both declarations of taking, namely, the original filed January 21, 1942 and the second filed October 22, 1943, unauthorized and insufficient to vest title in the United States of America and of no effect; vacating, setting aside and quashing the judgment entered January 23, 1942; and dismissing both the original petition in condemnation and the amended petition but without prejudice to the filing of a new or amended petition (R. I, 75).

General exceptions were allowed in this order but the government acquiesced therein and in accordance with the leave thereby granted filed on the same day a third declaration of taking (R. I, 82) and thereafter a second amended petition in condemnation (R. I, 92) which differ from the second dec-

laration of taking and the amended petition in condemnation only by adding to the statutes previously given as constituting authority to acquire, the Federal Highway Act approved November 9, 1921, an Act of September 5, 1940 (54 Stat. 867), the Department of Agriculture Appropriation Act 1944, approved July 12, 1943, and an amendment to the Federal Highway Act, approved July 13, 1943. Appellant moved against this third declaration of taking in the same manner and upon the same grounds as it had moved against the previous declarations of taking (R. I, 86). This motion came on to be heard in the following term of the District Court.

Following extended argument (R. I, 185-206), the court ruled:

> "If full expression be given to the language of that order (the order of November 12, 1943), I would feel that I was foreclosed from making any other than a similar one at this time." (R. I, 206.)

and notwithstanding the government had made no application to vacate or in any way modify that order, on its own motion, modified that order, saying:

> "I shall be compelled, at this time, in this hearing, to virtually repudiate a part of the order that I made at that time, that is, in so far as it may be a finality." (R. I, 208. See also R. I, 217.)

In accordance with that ruling, the District Court

on May 23, 1944, granted government's motion for the entry of judgment on the third declaration of taking, filed November 12, 1943; denied appellant's motion to quash and adjudge null and void said declaration of taking; granted the government's request that its second amended petition in condemnation be filed; and on its own motion, modified its order of November 12, 1943 (R. I, 99), and made and entered a judgment on said third declaration of taking (R. I, 108).

By the terms of that judgment, the district Court purported to confirm whatever possession the government had taken two years previously by virtue of the judgment entered January 23, 1942 on the original declaration of taking, which judgment the Court had six months earlier and in a previous term of the court, vacated, set aside and held for naught because the declaration of taking on which it was based was unauthorized.

Polson Logging Company's appeal from that judgment was dismissed as premature, this Court saying:

> "The judgment on the taking may still be attacked on an appeal from the subsequent and final judgment in which damages are determined."
>
> *Polson Logging Company* vs. *United States,* 149 Fed. (2) 877, at 878.

After the filing of this Court's mandate, appellant renewed its challenge to the sufficiency, effectiveness and validity of the third declaration of taking and again moved to quash or otherwise adjudge null and void the judgment entered thereon on May 23, 1944 (R. II, 250). That motion, together with appellant's motion to dismiss and strike and its demurrer to the second amended petition in condemnation which had been filed May 23, 1944, were denied and overruled November 12, 1945 (R. II, 257). Appellant, following the suggestion in this Court's opinion on the first appeal (Opin. 149 Fed. (2) p. 878) and to preserve the record in respect of its attack on the legality and validity of the taking (R. II, 331-332), filed an answer on November 12, 1945 (R. II, 259) reasserting its denial of any authority in the Secretary of Agriculture to acquire the property here involved.

After four days of trial, during which the District Court erred to the prejudice of appellant in excluding evidence and instructing the jury in respect of matters to be taken into consideration in determining just compensation, as will be hereinafter particularly specified and demonstrated, the jury returned its verdict fixing the just compensation for the lands taken at $6500.00 (R. II, 289). Appellant moved for a new trial, which motion was overruled (R. II, 290 and 296), and judgment was entered on the verdict

December 19, 1945 (R. II, 298).

This appeal followed.

QUESTIONS INVOLVED

Two primary and several secondary questions are presented by this appeal.

I. Primary question No. 1, raised by appellant's several motions to quash and adjudge null and void the successive declarations of taking, its several motions to dismiss the successive petitions in condemnation, its answer, and its motion for a new trial, is:

> Whether the proposed taking by the United States of America was authorized by the statutes upon which it was predicated?

Secondary thereto are the following further questions:

A. Was the purported taking of the so-called gravel lands, Tracts 2 and 3, as more particularly described in the second and third declarations of taking, authorized by the statutes upon which it was predicated, or at all?

B. Did the District Court have jurisdiction on May 23, 1944, in its February 1944 term, to set aside or amend or modify the order entered by it on November 12, 1943, in its previous July 1943 term?

C. Is not the government, by reason of its failure to except to the order of November 12, 1943 and its acquiescence therein by filing a third declaration of taking and a second amended petition in condemnation, estopped to question the propriety of that order and are not both the Court and all parties to the case bound by the ruling embodied in that order as the law of the case?

II. Primary question No. 2, raised by the Court's rulings and instructions to the jury on the elements to be considered in determining just compensation and appellant's objections and exceptions thereto, is:

> Whether in determining just compensation there could be taken into consideration, (a) the timber of others, including the large stand of National Forest timber, which is tributary to and accessible from the roads taken and will naturally and normally be removed thereover; and (b) the earnings that might reasonably be expected from tolls charged for the use of such roads for such transportation?

SPECIFICATION OF ERRORS

The District Court erred as follows:

1. In denying appellant's motion to quash and adjudge null and void the third declaration of taking filed November 12, 1943 (R. I, 99).

2. In modifying on May 23, 1944, its order en-

tered November 12, 1943 (R. I, 100).

3. In granting the government's motion for the entry of judgment on said third declaration of taking (R. I, 100).

4. In entering judgment on May 23, 1944, on said third declaration of taking (R. I, 108).

5. In purporting, by said judgment of May 23, 1944, to confirm whatever possession was taken on or about February 5, 1942, under and pursuant to a judgment entered January 23, 1942, on the original declaration of taking filed in the cause, which judgment had been vacated, set aside and quashed by the court's order of November 12, 1943 (R. I, 112).

6. In denying appellant's motion to dismiss and strike the second petition in condemnation (R. II, 257).

7. In overruling appellant's demurrer to said second amended petition in condemnation (R. II, 258).

8. In denying appellant's motion to quash and adjudge null and void the third declaration of taking and to vacate the judgment entered thereon on May 23, 1944 (R. II, 258).

9. In entering its order of September 24, 1945, fixing the date of valuation of the property taken

as October 22, 1943 (R. II, 253).

10. In instructing the jury:

> "In regard to the time when the Government took possession of this property, you are instructed as a matter of law that it acquired fee simple title to the property on Ocober 22, 1943." (R. III, 764.)

to the giving of which instruction appellant excepted as follows:

> "Mr. Metzger: I would ask on behalf of respondent a further exception to that instruction, wherein the Court advised the jury that the government acquired full title to this property on October 22, 1943, it being our position as heretofore stated, First, that the declaration of taking of that filing date, has heretofore been held null and void, and that order has not been—as to that effect, has not been set aside, and is the law of this case; and Secondly, that—
>
> "The Court: October the 22nd, 1943?
>
> "Mr. Metzger: Yes, that order—
>
> "The Court: I don't know that that order set aside—
>
> "Mr. Metzger: The order of November 12, held that declaration of taking null and of no effect. That order so holding has never been set aside.
>
> "The Court: Well, there were certain limitations in that order.

"Mr. Metzger: I appreciate, Your Honor. I am again—

"The Court: But you may make your record.

"Mr. Metzger: I am making my record, Your Honor please, and for the further reason that the record in this case, neither the declaration nor the second amended petition in condemnation, shows any authority in the Secretary of Agriculture to acquire these lands, at all.

"The Court: Your exceptions will be noted and allowed, Mr. Metzger." (R. III, 781-782.)

11. In refusing appellant's requested Instruction No. 3, as follows:

"Instruction No. 3

"The owner of property sought to be condemned is entitled to its 'market value fairly determined.' That value may reflect not only the use to which the property was devoted at the time as of which the market value is to be determined, but also that use to which it may be readily converted. In that connection, the value of the property is not to be measured merely by the use to which it is or can be put as a separate tract, but you must consider and determine that value in the light of any special or higher use for which the property in question may be available in connection with other properties, if you find from the evidence that there is a reasonable probability of such connection in the reasonably near future." (R. II, 280.)

to the refusal of which instruction appellant excepted as follows:

"Mr. Metzger: If Your Honor please, the respondent Polson Logging Company excepts to the Court's refusal to give its requested instruction No. 3 . . . and particularly to the refusal to give to the jury either in that instruction or in any of your instructions, the low that the jury must consider and determine the value of the property in the light of any special or higher use for which it may be available, in connection with other properties, if they find from the evidence that there is a reasonable probability of such connection in the reasonably near future. That I believe is the law as laid down by the Supreme Court of the United States in the Powelson case cited to the Court with that instruction.

"The Court: Your exception will be noted. The Court takes the position it gave in substance the instruction as requested, but in its own language.

"Mr. Metzger: When 'noted', that means an exception is allowed?

"The Court: Exception is allowed." (R. III, 777-778.)

12. In refusing appellant's requested Instruction No. 8, reading as follows:

"Instruction No. 8

"In arriving at the value of the property involved in this case, it is essential that the jury

consider the character, nature and extent of the improvements and the uses to which the land in its improved state may be put. The jury should consider whether the property is adapted to the particular uses claimed for it and whether it is or it is not profitable and valuable for such uses. Whether property is profitable and valuable for a particular use is always a controlling consideration in determining the value of the property itself." (R. II, 282-283.)

to the refusal of which instruction Appellant excepted as follows:

"Mr. Metzger: We except to the refusal of the Court to give our—Respondent's requested instruction No. 8, which is an instruction stating the law of this state as laid down by the Supreme Court of the state in the case of the Montana Railway Company vs. Roeder, 30 Wash. 240, which was cited to the Court with the instruction. Is that exception allowed, Your Honor?

"The Court: The exception is allowed, yes." (R. III, 778.)

13. In refusing appellant's requested Instruction No. 13, reading as follows:

"Instruction No. 13

"The jury are instructed that in determining the just compensation to be paid respondent Polson Logging Company, they are to take into consideration the nature and extent of the property of the respondent, with the improvements thereon, in the condition in which it was on

October 22, 1943, what it would have cost to reconstruct or reproduce said property and such improvements at that date, the depreciation which had accrued at said date in said property, the timber which was rendered accessible or was tributary to and which the jury believe from the evidence will in reasonable probability be transported thereover, the revenue which said respondent has heretofore derived from the use of such property for the transportation of logs and timber products together with the revenue which they believe it is reasonably probable that said respondent would have derived in the future, and any and all other factors which the jury believe would be given consideration and weight in bargaining for the sale and purchase of such property between purchasers willing and able but not compelled to buy, on the one hand, and sellers willing but not compelled to sell, on the other." (R. II, 286.)

to the refusal of which instruction appellant excepted as follows:

"Mr. Metzger: If Your Honor please, in connection with that instruction, I submitted it for the purpose of—did not expect Your Honor would give it, because—well, I submitted it for the purpose of making a record on its refusal, and I do not think Your Honor needs to examine it, so I take an exception to the refusal of the Court to give respondents Instruction 13.

"The Court: Your exception will be noted and allowed. Now, then as to the instructions given." (R. III, 779.)

14. In instructing the jury as follows:

"Potential uses of this property can not be considered by you insofar as they apply to or depend upon any uses to which the government itself may put the property after having acquired it. If, in this case, you find the highest and best use of this property is for truck or road purposes, then you will take into consideration the wants or needs as such may reasonably be expected in the near future by those who would make use of this property, but not including in such wants and needs the hauling of any forest timber and products which were not sold or marketed on the day the government first took possession of the property here in question." (R. III, 764.)

to the giving of which instruction appellant excepted as follows:

"Mr. Blair: The respondent excepts to the instruction of the Court where the Court instructed the jury variously, in four portions of the instructions, upon the same subject, substantially.

"In the first instance the Court told the jury substantially that in considering the uses to which the property might be put and for which it might be available, they should not include in or consider the hauling of any forest products not theretofore sold by the government on the date of taking. To that instruction we except because of our position heretofore stated throughout the trial that we believe the buyer and seller reasonably informed, would have considered the existence of that forest, and the fact that the government program called for, and in all reasonable expectation there would have been a cut from the forest twenty

million feet per year, and that would have furnished a traffic over the road which would have returned compensation to the owners of the road, and that those things reflect the market value of this road on October 22, 1943, and would have been given consideration by a buyer and a seller.

"The Court: Your exception will be noted and allowed." (R. III, 779-780.)

15. In instructing the jury as follows:

"And in that connection, I instruct you again, as I have heretofore, and probably shall further, that when the uses of this property was taken into consideration by the prospective buyer and prospective seller, those uses can not include any earnings that the property may make by reason of having transported thereover any timber that grows in the national forest that may be contiguous to it, or within the watershed." (R. III, 766-767.)

to the giving of which instruction appellant excepted as follows:

"Mr. Blair: For the same reason we except to the later charge of the Court upon the same subject, where the Court told the jury that the jury could not include in the uses of the road to be given consideration, any earnings from timber in the national forest. For the same reason,—

"The Court: "Yes, go right ahead." (R. III, 780.)

16. In instructing the jury as follows:

"In determining the just compensation to be paid for the taking of this property, you will not take into consideration any timber owned by anyone except the respondent, Polson Logging Company, in the use of the lands taken as a truck logging road. Any special value that the road may have to the government for use in connection with its national forest must be excluded by you as an element of market value. The fact that there is a large stand of national forest timber which may be logged in the future and hauled out over this road must not be considered by you as an element of damage; therefore, in considering this case, no allowance may be made for any value that a prospective purchaser would place upon this land as a road over which the government owned timber would necessarily move." (R. III, 768.)

to the giving of which instruction appellant excepted as follows:

"Mr. Blair: For the same reason we further except to the subsequent charge to the jury that no consideration should be given or allowance made for any value in the road taken, because of the government owned timber that might or would move over the road.

"The Court: Exception may be noted and allowed."

* * *

"Mr. Blair: Respondent further excepts to that portion of the Court's charge wherein the Court told the jury in substance that they should not take into consideration any timber owned by

others than Polson Logging Company.

"The Court: Yes, you may have an exception." (R. III, 780-781.)

17. In instructing the jury as follows:

"You can allow only such value for the lands taken which you believe a private purchaser, acting as a reasonably prudent person, and being an informed man, would pay for it, knowing that he could not anticipate any earnings or revenues that he might derive by reason of the national forest timber which is in the Humptulips Watershed." (R. III, 768.)

to the giving of which instruction appellant excepted as follows:

"Mr. Blair: And for the same reason we except to that portion of the jury's charge where the Court charged the jury in substance that they should not consider any earnings from timber in the United States forest, and particularly that part thereof constituting the Humptulips River watershed.

"The Court: You are not excepting to the fact that I used the 'Humptulips Watershed', but as it applied to forest timber?

"Mr. Blair: That is correct." (R. III, 780-781.)

18. In ruling at the conclusion of the first day of the trial, that revenues or earnings for the use of the roads taken for the transportation of timber from

the Olympic National Forest to the public highway could not be taken into consideration in determining just compensation, as follows:

> "The Court: Now, there are apparently at least two legal matters that should be disposed of.(,) I think before we go much farther in this case, and we can expedite it by making a disposition of it, and one is as to whether this is a public road, . . . (R. II, 406) The other that I would like to settle is this issue that has just been suggested slightly here in the course of the afternoon, that you were going to claim compensation based upon toll values of the hauling over the road from the National Forest to the public highway, . . . (R. II, 411.)
>
> "The Court: I shall now hold on the two issues passed upon, the one, that is benefits to the adjoining land owner except as they involve asserted losses, claimed by severance, cannot be shown; that the respondent on the other hand cannot show as an item of compensation any future potential or prospective tolls that he might have earned on this road by the haulage from the forest of growing timber, or by any use that the general public might make to this way of ingress and egress to enter the forest, or go from the forest at any time." (R. II, 420-421.)

to which latter ruling appellant excepted as follows:

> "Mr. Blair: In order to protect the record, we except to Your Honor's ruling that we are not entitled to show prospective earnings; that an owner not compelled to sell and a buyer not compelled to buy, would consider those respective earnings in arriving at the fair cash market value.

"The Court: I think it is perfectly proper to except, and your exceptions are allowed, and I presume the Government excepts to the ruling against accepting benefits." (R. II, 422-423.)

Cf. the Court's latter restatement of this ruling, as follows:

"The Court has ruled upon this issue that what timber is there in this National Forest that is contiguous to this—and moves out over this road, cannot be a factor in fixing market value of the road, . . ." (R. II, 672.)

19. In limiting cross examination of the government's witness Paul H. Logan so as to prevent appellant proving by said witness the quantity of timber in the Olympic National Forest which would normally come out over the roads taken by the government, as follows:

By Mr. Metzger:

"Q. Well, how much north in the national forest for logging purposes is accessible or tributable to come out over these roads?

"A. Owned by the same party?

"Q. No, how much timber.

"Mr. Keenan: That is objected to.

"The Court: I think that I will sustain the objection. You mean how much Government timber?

"Mr. Metzger: I don't care; how much timber?

"The Court: I will sustain the objection unless you qualify your question to cover privately held timber. I thought I made it clear yesterday on this issue. I don't mean to keep you from making your offer of proof. The position of the Court is, and the jury will be charged in due time, that no estimate can be made on the hauling of the national forest products over this or any other road within the next year or ten years or any other time." (R. II, 497.)

20. In limiting cross examination of government's witness Paul H. Logan so as to preclude the appellant from proving by said witness that all timber in the area the sale of which was contemplated by the government would come out over the roads taken, as follows:

"Q. And all of the sales that the Government contempates of timber in that area will come out over this road?

"Mr. Keenan: That is objected to, if the Court please.

"The Court: I shall sustain the objection to the question. I shall have to sustain the objection.

"Mr. Metzger: Well, we offer to prove by this witness that his answer to that question would be in the affirmative.

"The Court: I am assuming that the petitioner objects to your offer of proof.

"Mr. Keenan: I object to the offer of proof. I think it is irrelevant and immaterial.

"Mr. Metzger: Allow us an exception." (R. II, 500-501.)

21. In limiting cross examination of the government's witness Paul H. Logan so as to preclude the appellant from proving by said witness that in specific sales of timber in the Olympic National Forest the government advertised that the roads taken would be available for the removal of the timber involved in such sales, as follows:

"Q. Mr. Logan, in advertising this sale in Section 2, 21, North Range 9 West, and 34 and 35, Township 22 North, Range 9 West, the advertisement was published, was it not?

"A. Yes.

"Mr. Keenan: That is objected to. I conceive that irrelevant and immaterial as far as applied to any issue in this case is concerned.

"The Court: He has answered in the affirmative. I don't know what the purpose of this question is.

"Q. And in advertising that sale, it was stated that this road would be available for the removal of the timber?

"Mr. Keenan: That is objected to, Your Honor.

"The Court: Sustain the objection.

"Mr. Metzger: Exception, and again we offer to prove that this is a matter of public advertisement that the Government and all persons generally in considering market value are advised by the Government that they propose to use this road as a means of removing this timber.

"The Court: Yes, but Mr. Metzger, if you assume that to be a fact, it probably is a fact, but that still does not become a factor in fixing the value the Government must pay for the road, or the land.

"Mr. Metzger: Any purchaser or seller would take that into consideration in arriving at what they would pay.

"The Court: That may or may not be the objective the Government had in acquiring this right of way.

"Mr. Metzger: They stated so in this petition this declaration of taking.

"The Court: It is not material to the jury in placing the value they are going to place upon it.

"Mr. Metzger: "Allow me an exception.

"The Court: Yes." (R. II, 503-504.)

22. In limiting cross examination of the Government's witness Logan so as to preclude the appellant from proving by said witness that the proposed use of the roads taken for the removal of the Olympic

National Forest timber was a use for which the roads taken were available at the time of the taking, as follows:

"Q. (By Mr. Metzger) The highest and best use by the Government is the use for which this land is available, is it not?

"Mr. Keenan: That is objected to, Your Honor. It is obvious here that the Government is going to put the highest and best use, but that highest and best use does not relate to the Government use.

"Mr. Metzger: If that is the highest and best use, that is the rule, whoever it is.

"The Court: I don't think that is the rule of law. The use they put it to is not necessarily the fact, whatever they may see fit to use it for under their sovereign right to take it cannot be made the determining factor in what actually was the highest and best use at the time they did take it.

"Mr. Metzger: It is not a question of what then was the highest and best use. The question is, what is the highest and best use to which it may reasonably be put in the reasonable future by anybody, Government or anybody else.

"The Court: Well, the law might be subject to some qualification there. I think I shall sustain the objection." (R. II, 508-509.)

23. In limiting cross examination of the Government's witness Norman Porteous and thereby pre-

cluding appellant from proving by said witness that a business man would reasonably expect to collect a toll or charge of $1.50 per thousand feet for the transportation over the roads taken of timber removed from that area of the Olympic National Forest lying to the north of said roads, as follows:

> "Q. (By Mr. Blair) You would reasonably expect, wouldn't you, Mr. Porteous, the timber immediately to the north, a dollar and a half a thousand would be a fair charge that you would have been able to obtain for moving it over your road?
>
> "Mr. Keenan: That is objected to.
>
> "The Court: Objection sustained.
>
> "Q. You say you would expect to get what the traffic would bear?
>
> "A. Yes.
>
> "Mr. Blair: I think that is all." (R. II, 528.)

24. In denying appellant's motion made at the conclusion of the Government's case to dismiss the action as to tracts 2 and 3, said motion and the Court's ruling being as follows:

> "Mr. Metzger: At the conclusion of the Government's case, the respondent, the Polson Logging Company, moves to dismiss the action as to tracts two and three, being the acreage, on the ground that there is no evidence here that the

taking is for any authorized purpose, but merely to enlarge the boundaries of the Olympic National Forest for the purpose of growing trees there, which is prohibited by statute unless sanctioned by a special act of Congress. (R. III, 537-538.)

"Mr. Metzger: I move to dismiss the petition as to tracts two and three on the ground there is no showing that the lands are valuable for the uses for which it is now testified they are sought to be taken and there is no authority for the taking of those lands for the purposes which the government testimony alone disclosed they are valuable.

"The Court: The motion will be denied and an exception allowed." (R. III, 575-576.)

25. In refusing to permit appellant to prove by its witness Andrew Anderson the quantity of timber in the National Forest which could or might be removed over the roads taken, as follows:

"Mr. Metzger: Q. Are you familiar with the timber in the National Forest—I think I have asked you this, immediately north of Township 21, 9 and the Township to the West, and the Township to the east?

"A. I am.

"Q. About what quantity of timber is there, there, which could be removed over this road?

"Mr. Keenan: That is objected to, Your Honor, the amount of timber in the National Forest that could be removed over these roads.

"The Court: The objection will be sustained.

"Mr. Metzger: The government testified to that in part already, Your Honor.

"The Court: I thought you developed that on cross-examination.

"Mr. Metzger: No, that was developed—

"The Court: But it is not an issue. The Court has taken a stand in this matter. It might possibly be—it would be so remote I doubt whether it should even be brought to the consideration of the jury. I think I shall sustain the objection as to the timber that might or might not be hauled over this road.

"Mr. Metzger: All right, Your Honor.

"The Court: You will have an exception." (R. III, 604-605.)

26. In refusing to permit appellant to prove by its witness Len Forrest that roads taken were used in the year 1945 for the removal of National Forest timber, as follows:

"Q. As a matter of fact, in the year 1945, has any National Forest timber been taken out over this road?

"Mr. Keenan: If the Court please—

"The Court: I shall sustain the objection. That is subsequent to the date of taking.

"Mr. Metzger: If Your Honor please, I think that the evidence goes to the adaptability of this road for that purpose, regardless of when it was done.

"The Court: I do not think there is any issue here, but that the road is adaptable to hauling logs if it is constructed and rebuilt to meet that situation.

"Mr. Metzger: Well, the removal of the forest timber is the direct issue, and I think we are entitled—

"The Court: Well, the Court has held, Mr. Metzger—

"Mr. Metzger: I know you have held that the tolls could not be shown, but the adaptability of this road to remove the National Forest timber, I think it was in—not within Your Honor's ruling. At least, I did not understand that was Your Honor's ruling—that Your Honor's ruling went that far.

"The Court: I did not understand there is any issue, but I don't think that will help fix values, but that the road is going to be used in the years to come for the removal—over which Forest timber will be hauled when sold.

"Mr. Metzger: All right.

"The Court: You do not contest that issue, do you, Mr. Keenan?

"Mr. Keenan: No, we do not contest that, Your Honor." (R. III, 629-630.)

27. In refusing to permit appellant to prove by its witness Charles E. Reynolds that it is current practice for a truck logger to hire the use of a logging road owned by another at a rate fixed by the quantity of logs taken; that it is the policy and practice of the United States Forest Service to sell national forest timber to private loggers to cut and remove; and that a buyer and seller dealing at arm's length for the roads taken would have given consideration to the Olympic National Forest timber to the north, and would have expected that timber to be sold in reasonable quantities from year to year and to be logged over the roads taken, as follows:

> "Q. (By Mr. Blair) And state whether or not, Mr. Reynolds, it is a matter of rather ordinary practice in truck logging in these days for one logger to hire the use of a logging road owned by another party at a rate fixed by the quantity of logs taken over the road?
>
> "Mr. Keenan: That is objected to.
>
> "The Court: I think I shall sustain the objection.
>
> "Q. Mr. Reynolds, state whether or not it is the policy of the Forest Service—well, state what the policy of the Forest Service is with respect to whether it logs its own mature timber or sells the timber to private loggers to cut and remove?
>
> "Mr. Keenan: That is objected to, Your Honor.

I think it has no bearing on the value here, the policy of the Forest Service with respect to the disposal of its own timber.

"The Court: No, I don't think it is a matter of policy. I think it is a matter of law and regulation provided under the law.

"Q. Well, can you state, Mr. Reynolds, what the practice is in the Forest Service with respect to whether it logs its own timber or sells that timber to private operators to log?

"Mr. Keenan: That is objected to, Your Honor. I think it makes no difference whether it is the practice, or under the law, or what the situation is. They act, of course, under statutes. I don't see it has any bearing.

"The Court: The Court has ruled upon this issue that what timber is there in this National Forest that is contiguous to this—and moves out over this road, cannot be a factor in fixing market value of the road, or fixing appreciation or depreciation to the remaining land.

"Mr. Blair: I want to get the witness far enough so I can make an offer of proof, covering —or to come within that ruling that the Court has just announced, and if the objection to this question is sustained, then I will use that as the basis for making an offer of proof.

(Question read.)

"A. I think it has.

"Q. What was the practice?

"Mr. Keenan: If you are asking this preliminary to an offer of proof, I will withdraw my objection.

"A. As far as I am aware, I think the general practice is to sell the timber to private operators.

"Q. Mr. Reynolds, would you have, if you had been either the owner, willing, but not compelled to sell, or prospective buyer, willing but not compelled to buy the road that is under condemnation here, on October 22, 1943, would you have considered and given consideration to the timber that is standing in the Olympic National Forest to the north of the road, and would you have expected that that timber would be sold by the Forest Service in quantities—of reasonable quantities from year to year, and would you reasonably have expected that it would be logged over this road?

"Mr. Keenan: That is objected to, Your Honor.

"The Court: I will sustain the objection and allow an exception." (R. III, 671-673.)

28. In denying the appellant's offer of proof by its witness Charles E. Reynolds, as follows:

"Mr. Blair: We offer to prove by the witness Charles Reynolds, that the property under condemnation had value to buyer and seller, generally, on October 22, 1943, irrespective of whether that buyer or seller owned any timber in the Olympic National Forest north of the highway, because an informed and reasonably advised and prudent person in the position of a buyer—prospective buyer or prospective seller, would have taken into

consideration and given value to this road, because of the reasonable prospect that the timber in the national forest would be sold to private loggers, and that in ordinary experience and probability, that timber would be removed to market over the road that is under condemnation, and that owners of that timber—purchasers of it from the government and other owners in the forest would pay the reasonable value of their use of this road for that purpose, and that those factors would have been considered by advised and informed persons in the position of prospective buyers and sellers of this property on October 22, 1943.

"The Court: Your offer does not offer to include how much of that timber would be sold in any given period of time.

"Mr. Blair: No, it does not. I don't know whether the testimony is in the record, but it may be. If not, I would like to include in the offer that they would have anticipated that in the ordinary and reasonable course of events that timber would be sold by the Forest Service at the rate of approximately twenty million feet per year.

"Mr. Keenan: It is objected to, Your Honor.

"The Court: The objection will have to be sustained to the offer, and an exception allowed." (R. III, 700-701.)

29. In striking the testimony of the appellant's witness Blain H. McGillicuddy that the fair cash market value of the roads taken was $250,000, as follows:

"Mr. Keenan: At this time I move to strike the testimony of this witness as to the fair cash market value of the lands. He has stated that a purchaser of the land at his figure would be some one interested in taking a gamble on it—in exploiting the government timber which this road extends to, and I submit that is not—

"The Court: I am inclined to think that the motion has to be granted. I am willing to hear from the Respondents.

"Mr. Blair: Your Honor, we believe the correct rule of law is that the value of this property to the government at the time of the taking can not be considered by the jury. It is the question of what did the Polson Logging Company lose, and what did the government acquire, that is material here. However, it already appears as evidence in this case that it would have been reasonably expected by an owner or a prospective purchaser of this logging road in 1943, that the timber in the government's national forest would be, from time to time, sold. The testimony was that it is the last stand and the most immediately available stand to keep the mills in the Grays Harbor area in operation, and a buyer and a seller at that time would normally and naturally have considered the prospect that from time to time that timber would come out over this road, and they would get the value of the service of the road in removing that timber.

"Now the rule is that you can not consider the value of the timber to the taker, and when the taker is the only one that could use the property for the purpose taken, then that use cannot

be considered, but when the service is available to the taker, and when the use for which the taker is taking the property could have been available to another party, then that use may be considered. So here, a private owner could—Polson Logging Company or someone else, could have continued to own this road. True, it is, they are not entitled to any damages for any prior right to purchase government timber out of the government watershed. They are not entitled to a nickel for that, but they are entitled to the value a business man would have paid in October of 1943 for this road, with the prospect that the purchasers from the government of that timber in the forest, are going to bring that timber out over this road as long as the charges for doing so are reasonable. That was one of the things that Mr. Abel testified; as the government's witness—his name I don't now recall, testified—he said had he owned this road in October, 1943, he would have expected to haul that timber out of the Upper Humptulips as it was sold by the government to private loggers, he would have expected to haul it out.

"The Court: Of course, Mr. Blair, the fact that they might have expected, would not necessarily make it so.

"The Supreme Court of this state has passed upon a set of facts that are almost identical. I can't give you the case, but it involves a narrow canyon through which the timber of a certain watershed must pass, and of course they held that no consideration must be given to the possibility and the potentiality of the timber being sold or being marketed—being harvested, and that is doubly true, it seems to the Court, in a case

where the Federal Government is the owner of the timber, and they elect not to put any of it on the market for ten or fifteen years, and the realm of speculation continues, and uncertainty, and I think it is an improper element to consider—that is, the taking by the government, and I shall have to hold against you, but I am not going to foreclose you from asking this witness what his opinion is as to the value of the property that has been taken, eliminating a calculation based upon the revenue that might be produced by the cutting and marketing of the government timber, and I shall have to strike his answer upon which he has fixed values, and instruct the jury to disregard it." (R. III, 696-699.)

30. In precluding appellant from proving by its witness McGillicuddy that an owner or prospective purchaser, being informed as to the general situation with respect to the roads and the timber around them, would have given value to the road because purchasers of the timber would pay for the use of the road to remove such timber, as follows:

"Q. Mr. McGillicuddy, in your opinion would an owner or prospective purchaser, being informed of the general situation existing with respect to this road and the timber surrounding it, and in view of the ownership as they existed at that time, have given value to this road for its use in hauling timber to—or its use by permitting others to haul their timber coming out of the Olympic National Forest to the north of this road?

"The Court: That is independent of the government owned timber.

"Mr. Blair: That includes—irrespective of who owned the timber, but in view of the actual ownership at the time. I want him to take into consideration who owned it, the fact that the government did own substantially all of it, and answer whether in his opinion the buyer and seller would have given value to the road for hiring the road out to purchasers of that timber to remove their timber over the road.

"The Court: I will sustain the objection." (R. III, 699-700.)

31. In denying appellant's offer of proof by its witness McGillicuddy, as follows:

"Mr. Blair: . . . We offer to prove by the witness McGillicuddy that an informed person, being in the position of either a prospective buyer or a prospective seller of the property under condemnation here, would have dealt on October 22, 1943, for this property, reasonably expecting that the timber in the Olympic National Forest to the north, to the extent of approximately one billion five hundred million feet would in the ordinary and normal course be brought out of that forest, using this road as one of the links to transport it from the forest to market; that they would have reasonably dealt on the expectation that that timber is to be logged at the rate of approximately twenty million feet per year; that in determining and arriving finally at a price between them, they would have given consideration to the practicability and probability of the timber coming out

over this road, and would have further given consideration to the fact that it is possible to remove that timber by other routes, primarily by a route extending westerly from—or easterly from Public Highway No. 101, which goes through the Olympic Forest, which route would have been more expensive to construct and more expensive to operate over, and that such an informed buyer and seller would have been affected, and their negotiations would have given consideration to the probability that as long as the toll charges or rental charges for the use of this road was reasonable, that this road would have been used for the removal of that timber in the ordinary course of human experience.

"Mr. Keenan: That is objected to, Your Honor, as being incompetent, irrelevant and—

"The Court: Objection will be sustained, and exception allowed." (R. III, 701-702.)

32. In refusing to permit appellant's witness McGillicuddy to testify as to his opinion as to the market value of the roads taken, giving consideration to the seventy million feet of timber owned by Polson Logging Company and others, but excluding the government owned timber, as follows:

"Q. Mr. McGillicuddy, assuming there were upward of seventy million feet of timber owned by others than the United States Government lying in the territory of the sections to the north of lands through which this road passes, and in the Olympic National Forest, would you advise

your client owning the tree farm there to pay the reproduction cost of that road?

"Mr. Keenan: That is objected to, Your Honor. He is talking now of privately owned timber—is that right?

"Mr. Blair: Yes, sir.

"Mr. Keenan: Which is not in the Polson ownership.

"Mr. Blair: Part of it is.

"Mr. Keenan: If it isn't all in Polson's ownership and shown here, the question is objected to. In other words, it is to speculate, and too remote when that timber would come out. They don't have to use this road. It is purely speculative.

"The Court: I am inclined to believe that it is in the realm of speculation, as to the timber that is owned by the Respondent, and of course they would know when they want to move it, and of course if some showing were made that plans were under way to move this other private timber, at or about the time this land was taken. There has been no such showing, as I recall.

"Mr. Blair: No, there is no such showing of that kind.

"The Court: So I shall sustain the objection to the question in the form it is asked, but not depriving you from reframing your question to include any timber that the Polson Logging Company actually owned or controlled that they

planned on moving over this road." (R. III, 715-716.)

33. In refusing to permit appellant's witness Frank D. Hobe, after he had testified that an informed owner and prospective buyer negotiating for the sale of the roads taken by the government would give consideration to the government owned timber in the Olympic National Forest and that that consideration would have influenced the market value of the roads and that he had formed an opinion as to its fair cash market value (R. III, 727-728), to testify as to such value, as follows:

"Q. And now, giving consideration to all of those factors, Mr. Hobe, including the factors that you previously testified to would be considered by that buyer and by that seller, what in your opinion was that fair, cash market value?

"Mr. Keenan: Now, if Your Honor please, that question is objected to on the ground the witness is being asked what his opinion is on fair, cash market value, giving consideration to the government owned timber to the north of this property.

"Mr. Blair: That is right.

"Mr. Keenan: It is identically the same situation we had yesterday afternoon with Mr. McGillicuddy.

"The Court: Yes.

"Mr. Blair: Yes, if the witness answers, he will have given consideration to those factors.

"The Court: I shall have to sustain the objection, and the objection does not go to his qualifications as an expert to express an opinion." (R. III, 727-728.)

and again:

"Q. (By Mr. Blair) Mr. Hobe, considering the Olympic National Forest timber to the north and all other elements that in your opinion would enter into the question of fair cash market value between an informed buyer and seller, what in your opinion was the fair cash market value of the property on October 22, 1943?

"Mr. Keenan: Objected to.

"The Court: Objection will be sustained, exception allowed." (R. III, 747.)

34. In refusing to permit appellant's witness Hobe to give his opinion as to the fair cash market value of the property taken without consideration of the government owned timber in the Olympic National Forest, as follows:

"Q. Now, Mr. Hobe, have you also considered the fair, cash market value, as the value that would be arrived at between that informed buyer and informed seller, as on October 22, 1943, without giving any regard or consideration to the timber that is in the Olympic National Forest and owned by the United States?

"A. I have.

* * *

"Q. Will you now tell the jury, Mr. Hobe, what the fair, cash market value was as of that date, without giving any consideration on the part of either the buyer or the seller to the timber that is in the Olympic National Forest, and owned by the United States, but giving consideration to all other factors that would have been considered.

"Mr. Keenan: If the Court please, that is objected to, because now the witness has—or the question would exclude from the witness' mind the national forest timber, but it would include other timber which is privately owned, and which is also speculative.

"The Court: I think that is correct. The Court will sustain the objection to the question in the form it is made." (R. III, 728-729.)

35. In denying appellant's offer of proof of the market value of the roads taken, by its witness Hobe, as follows:

"Mr. Blair: The respondent offers to prove by the witness Hobe that the market value of the property under condemnation, arrived at between an informed buyer and an informed seller, would have been affected by, and they would have given consideration to, among other things, that the road under condemnation provides the best and most practicable route for moving to market approximately one and one-half billion feet of mature timber in the Humptulips watershed area of

the Olympic National Forest; that the Forest Service contemplated and that it was a reasonable expectation, that the annual log production from that portion of the Olympic National Forest in the Humptulips basin, which would normally and in reasonable expectancy—strike the words 'normally' and 'reasonable'—was at the rate of twenty million board feet per year; that there are other routes over which roads could be developed to remove this timber, including a road into the timber from Highway No. 101 to the west at a point northerly of the township line between Township 21 North and 22 North, and running thence easterly, but that this route would be more expensive to construct and to operate over than the road under condemnation; that had the witness given consideration to these factors and to all other factors which in his opinion would be given consideration by such informed buyer and seller, as of October 22, 1943—

"The Court: Is that your offer?

"Mr. Blair: I have just one more phrase, Your Honor—in his opinion, considering all such factors, the fair, cash market value of the property on that date was in the sum of three hundred thousand dollars.

"Mr. Keenan: I object to it, Your Honor, on the grounds that it is incompetent, irrelevant and immaterial, because it takes into consideration the needs of the government and the probable use in the future as a toll road, to exact a toll on timber sold by the United States.

"The Court: The Court sustained the objec-

tion on the grounds broader than yours, Mr. Keenan; that it is contingent, that may or may not happen; that it is remote and speculative, and I therefore shall sustain the objection." (R. III, 751-752.)

36. In refusing to admit in evidence a letter from the Department of Agriculture, Forest Service, over the signature of F. A. Brundage, Acting Regional Forester, dated May 13, 1942, marked for identification Respondent's Exhibit A-14, or at least that portion thereof stating that it is the policy of the Forest Service to log the area of the Olympic National Forest tributary to the roads taken at the rate of twenty million feet a year. (R. III, 751), which offer was objected to and denied, as follows:

"Mr. Keenan: I am going to object to it, Your Honor. It is a discussion of an offer of compromise." (R. III, 750.)

"The Court: This letter, I shall have to sustain the objection to its admission, but it will remain, of course, as a part of the record in the case." (R. III, 752.)

37. In denying appellant's offer to prove by its witness Len Forrest that the United States National Forest Service plan to sell for cutting and removal not less than twenty million feet (per year) of the mature timber in the drainage basin of the Humptulips River immediately north of the lands taken, and to remove that timber by means of these roads,

as follows:

"Mr. Metzger: We offer to prove by the witness Len Forrest who has been sworn, that prior to October 22, 1943, Ira J. Mason, then the Acting —or then the Assistant Regional Forester for the United States National Forest Service, and Mr. F. H. Brundage I think is the man who signed this letter—in any event, the Acting Regional Forester, stated to the officers of the Polson Logging Company on different occasions that the United States National Forest Service planned and proposed to cut and remove—to sell for cutting and removal, not less than twenty million feet of ripe and mature timber in the drainage basin of the Humptulips River lying immediately north of the lands in question in this suit, and to remove that timber by means of those roads. I think that is all.

"The Court: Your offer does not go any farther than that?

"Mr. Metzger: No.

"The Court: That there would be a revenue or a toll charged for the timber hauled out over the road?

"Mr. Metzger: My offer simply goes to the fact as to the rate of removal and the method of removal.

"Mr. Keenan: If the Court please—

"The Court: The offer will be denied and an exception allowed.

"Mr. Metzger: You will allow us an exception?

"The Court: Yes." (R. III, 752-753.)

38. In refusing to admit in evidence the second declaration of taking dated April 21, 1942, exclusive of the fifth paragraph thereof, as follows:

"Mr. Metzger: At this time, Your Honor, we offer in evidence Declaration of Taking, made by Claude R. Wickard, Secretary of Agriculture of the United States, under date of April 21, 1942, and filed in this Court October 22, 1943, exclusive of Paragraph V thereof.

"Mr. Keenan: If the Court please, I think possibly an argument may follow this motion, and should be made outside of the presence of the jury.

"Mr. Metzger: This is an offer of evidence.

"Mr. Keenan: Any offer I think should. I don't understand the Declaration of Taking is admissible in any instance in one of these cases.

"The Court: I don't either.

"Mr. Metzger: I offer it for a statement of it, as an admission by the Government of the purposes for which this land is taken, being required by law to be stated and being stated in the Declaration.

The Court: The offer will be denied and an exception allowed, Mr. Metzger." (R. III, 757.)

39. In refusing to receive in evidence the third declaration of taking dated November 2, 1943, with the exception of Paragraph V thereof, as follows:

> "Mr. Metzger: I offer in evidence the Declaration of Taking executed by Paul H. Appleby as Under Secretary of Agriculture, November 2, 1943, and filed in this Court November 12, 1943, with the exception of Paragraph number V thereof—these two Declarations of Taking.
>
> "The Court: What is Paragraph V?
>
> "Mr. Metzger: V is the one which relates to the amount.
>
> "The Court: Oh.
>
> "Mr. Metzger: The amount of which I am not—
>
> "The Court: The offer will be denied and an exception allowed."
>
> "Mr. Metzger: Yes, you have allowed us an exception?
>
> "The Court: Yes." (R. III, 757-758.)

40. In denying appellant's Motion for a New Trial. (R. II, 290 and 296.)

41. In entering judgment on the verdict. (R. II, 298.)

ARGUMENT

I.

The Proposed Taking Is Unauthorized by the Statutes on Which It Is Predicated

Specifications of Error Nos. 1, 2, 3, 4, 6, 7, 8, 40, and 41

The power of the United States to take private property for public use is not questioned. The authority of the Secretary of Agriculture to exercise that power or to invoke its exercise for the purposes and under the circumstances here involved is challenged and denied.

1. The authority of a particular officer of the United States to exercise the power of eminent domain must be expressly delegated and clearly expressed:

> "The taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed. *Western U. Teleg. Co.* vs. *Pennsylvania R. Co.,* 195 U. S. 540, 569, 49 L. Ed. 312, 322, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; Lewis, Em. Dom., 3d ed. Sec. 371; *Springfield* vs. *Connecticut River R. Co.,* 4 Cush. 63, 69-72; *Holyoke Water Power Co.* vs. *Lyman,* 15 Wall. 500, 507, 21 L. ed. 133, 135. *Cf. Richmond* vs. *Southern Bell Teleph. & Teleg. Co.,* 174 U. S. 761, 777, 43 L. Ed. 1162, 1165, 19 Sup. Ct. Rep. 778."
>
> *Delaware L. & W. R. Co.* vs. *Morristown,* 276 U. S. 182, 192, 72 L. ed. 523, 527.

"The power of eminent domain is arbitrary in character and subversive of the right of private property and before it can be exercised by any officer of the Government, its delegation to him must plainly appear and may not be deduced from any ambiguous language or by doubtful inference. Laws authorizing public officers to exercise the sovereign power of eminent domain are strictly construed."

United States vs. *West Virginia Power Co.,* 33 Fed. Supp. 756, 759 (D. C. W. Va.);

United States vs. *Rowers,* 70 Fed. 758;

United States vs. *A Certain Tract of Land,* 70 Fed. 940.

2. The Act of August 1, 1888, 25 Stat. 357, 40 U.S.C.A. Section 257, does not authorize any officer of the United States to acquire private property for the United States but merely authorizes resort to the power of eminent domain as a means of acquisition where the power or authority to acquire has been duly granted to the particular officer.

Hanson Lumber Co. vs. *United States,* 261 U. S. 581, 67 L. ed. 809;

Barnidge vs. *United States,* 101 Fed. (2) 295 at 297 (CCA 8).

"We recall to mind what it is of which we are in quest. It is whether Congress has sanc-

tioned the condemnation of these lands. There is this distinction to be observed. The Executive may contract for the conveyance of lands to the United States. His authority to so do may be denied and brought in question. If unauthorized to acquire title, he clearly cannot condemn. If, however, he is so authorized, then he may condemn. If Congress appropriates moneys to pay for the lands, this is a sanction of the acquisition."

Dickinson, D. J. in *United States* vs. 458.95 *Acres,* 22 Fed. Supp. 1017 at 1020 (D. C. Penn).

3. The Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C.A. Section 258a, providing a procedure for the immediate acquisition of title through the filing of a declaration of taking, does not authorize the exercise of the power of eminent domain but merely prescribes machinery for the speedier exercise of that power.

City of Oakland vs. *United States,*
124 Fed. (2) 959 (CCA 9);

United States vs. 17,280 *Acres,*
47 Fed. Supp. 267 (D. C. Neb.);

United States vs. 76,800 *Acres,*
44 Fed. Supp. 653 (D. C. Ga.).

For an officer of the United States to avail himself of this new machinery, he must have been otherwise

and independently authorized to acquire the property. The Act of February 26, 1931, 40 U.S.C.A. Section 258a, therefore makes it mandatory that a

> "declaration of taking shall contain or have annexed thereto—
>
> "(1) A statement of the authority under which and the public use for which said lands are taken."

Without such statement of authority or if the stated authority is in fact and law no authority, the declaration of taking is wholly ineffective to vest title in the United States and is a nullity.

> *United States* vs. 72 *Acres,* 37 Fed. Supp. 397 (D. C. Cal.) Affirmed 124 Fed. (2) 959 (CCA 9).

> "In granting such a motion (i.e. motion for judgment on a declaraton of taking), the court necessarily has to decide . . . that the taking was duly authorized by law."

> *Puerto Rico Light & Power Co.* vs. *United States,* 131 Fed. (2) 491 at 494 (CCA 1).

4. The Statutes cited and relied on in the First and Second Declarations of Taking grant no authority to acquire.

The statutes relied on and set forth in the first and second declarations of taking filed in this cause do not grant to the Secretary of Agriculture author-

ity to acquire the property sought to be taken in express terms or by implication. They neither authorize acquisition by purchase or in any other manner, nor do they appropriate money to pay for such property. The District Court clearly ruled that under the statutes relied on, the Secretary of Agriculture was without authority to acquire, and consequently, that his declarations of taking were of no effect. (See order of November 12, 1943, R. 75-79.) That ruling acquiesced in by the government by the subsequent filing of a third declaration of taking and a second amended petition in condemnation, became the law of the case binding upon the court and parties.

Except for the different definition or characterization of the property to be taken, the first and second declarations of taking are identical in their statement of the authority relied on as authority to acquire. The first, dated January 8, 1942 and filed January 21, 1943, reads as follows (R. I, 16):

> "1. The Act of Congress approved June 4, 1897, 30 Stat. 34-36, as amended, and the Department of Agriculture Appropriation Act, 1942, (c. 267, 1st Session Pub. Law, 144-77th Congress), authorize me, in the name of the United States of America, to acquire the perpetual easement and right-of-way described in the Condemnation Petition in the above entitled proceeding and set forth hereinbelow."

The second, dated April 21, 1942 but not filed until

tion Act, 1942 (55 Stat. 408) is an appropriation act and nothing more. It, in turn, grants no authority to acquire lands for or in connection with the administration of the national forests. No claim has been or will be made that this act contains any express grant of such authority. No such authority can be implied by any appropriation made by it. *There is no appropriation to pay for these lands.*

The portions of that act, which are in any way germane to the question here involved, are set out in the appendix to this brief.

In the division of that act dealing with and captioned "FOREST ROADS AND TRAILS," appropriation is made "for carrying out the provisions of Section 23 of the Federal Highway Act approved November 9, 1921 (23 U. S. C. 23)."

By definition, the acquisition of rights of way is expressly excluded from the purposes or scope of said Federal Highway Act. Section 2 of that Act (23 U.S.C.A. Section 2) provides:

> "2. DEFINITIONS. When used in this Chapter, unless the context indicates otherwise,
>
> * * * *
>
> "The term 'construction' *means* the supervising, inspecting, actual building and all expenses incidental to the construction of a high-

way, except locating, surveying, mapping and *costs of right of way.*" (Italics ours.)

"When an exclusive definition is intended, the word 'means' is employed."

Roberts, J., in *Groman* vs. *Commissioner,* 302 U. S. 82, 86, 82 L. Ed. 63, 66.

In the division dealing with "FOREST SERVICE" and under the subheading "ACQUISITION OF LANDS FOR NATIONAL FORESTS," appropriation is made "for the acquisition of forest lands under the provisions of the Act approved March 1, 1911, as amended (16 U. S. C. 513-519, 521)." It is not claimed, but, on the contrary, it is disclaimed that the acquisition here sought is under or pursuant to the act (commonly referred to as the "Week's Act"), for the purposes of which said appropriation was made.

Again in the division dealing with "FOREST SERVICE" but under the subheading "SALARIES AND EXPENSES" and in the paragraph headed "National Forest Protection and Management:", there is an appropriation for "the *maintenance* of roads and trails and the *construction and maintenance of* all other improvements necessary for the proper and economical administration, protection, development and use of the National Forests, including experimental areas under Forest Service admin-

istration." No power to acquire a right of way can be implied from or is sanctioned by this appropriation. So far as roads and trails are concerned, the appropriation is limited to their maintenance (i.e. the appropriation is for the maintenance of something already existing and hence previously acquired.)

United States vs. *Threlkeld,* 72 Fed. (2) 464, decided July 28, 1934, held that an appropriation "for the *construction* and maintenance of roads, trails, bridges, fire lanes, telephone lines, cabins, fences and other improvements necessary for the proper and economical administration, protection and development of the forests" sanctioned the acquisition of the rights of way and other lands *within a National Forest* necessary for the construction of the roads and other improvements for which funds were appropriated. That decision was rested upon what is emphasized by the court as a highly significant fact that Congress had for many years made substantial appropriations for the *construction* of roads, trails and other improvements necessary for the administration, protection and development of the forests. The kernel of that decision is found in the following sentence:

> "We think the broad authority to construct and maintain roads and other improvements includes the power to acquire land for the purpose

if it is necessary, because when legislative authority to do a specified thing is conferred, the power to do all things reasonably necessary to its achievement is impliedly granted."

Opinion 72 Fed. (2) at Page 466.

But with that decision and the construction thereby made as to the effect of an appropriation for "construction," the language so emphasized and relied upon disappeared from the Department of Agriculture Appropriation Acts. With the Department of Agriculture Appropriation Act 1936, approved May 17, 1935, 49 Stat. 247, it became stereotyped in the language set out in the appendix hereto, *omitting any appropriation whatsoever for the "construction" of roads and trails.* (See the several Department of Agriculture Appropriation Acts from 1937 to 1944, inclusive, 49 Stat. 1421, 1437; 50 Stat. 395, 411; 52 Stat. 711, 726; 53 Stat. 939, 955; 54 Stat. 532, 546; 55 Stat. 408, 422; 56 Stat. 664, 680; and 57 Stat. 392 at 412.)

If it was significant that in 1933 and for many years prior thereto the Congress had appropriated for the Forest Service moneys for the *construction* and maintenance of roads, trails, bridges and other improvements, it is doubly significant that following a decision of the courts that such appropriation authorized the acquisition by the Secretary of Agricul-

ture of whatever lands he deemed necessary for road construction purposes, the Congress omitted and since that date has continued to omit any appropriation for the *construction* of roads and bridges and has limited its appropriation to the *maintenance of roads and trails* and the *construction and maintenance of all other* necessary improvements. The intent of the Congress to deprive the Secretary of Agriculture of the power to acquire lands, which the Court in the Threlkeld case had held was implicit in an appropriation for "construction," could not have been more clearly manifested.

When a change occurs in legislative language, particularly where the change is in language previously construed by the courts, there is a conclusive presumption that the legislative body intended to change the rule of decision.

> "The natural presumption is that the phraseology of the statute was changed in order to change its meaning. The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."
>
> *United States* vs. *Bashaw,*
> 50 Fed. 749, 753-4 (CCA 8th).

"When a law that has been construed by the

courts is re-enacted, the re-enactment adopts the construction that the court has placed upon the law. It also is true that when a legislative body amends a law that has been construed by the courts, and changes the language thereof, it intends to change the rule of decision upon the subject."

United States vs. *Southern Pacific Co.,*
230 Fed. 270, 274 (D. C. Cal.)

"A change of legislative purpose is to be presumed from a material change in the wording of a statute."

Lundquist vs. *Lundstrom,*
270 Pac. 696, 697 (D. Ct. App. Cal.)

Wm. Jameson & Co. vs. *Morgenthau,*
307 U. S. 171, 173, 83 L. Ed. 1189, 1192

Whitley vs *Superor Court Los Angeles County,*
113, Pac. (2) 449, 452 (Supm. Ct. Cal.)

Felin vs. *Kyle,*
22 Fed. Supp. 556, 559 (D. C. Penn.)

Stanolind Pipe Line Company vs. *Oklahoma Tax Commission,* 30 Fed. Supp. 131, 137 (D. C. Okla.)

On these grounds, (see Condensed Statement of Testimony R. I, 136-143), the District Court ruled as follows:

> "In view of your statement, Mr. Metzger, I think you may prepare an order, and both agree upon, not dismissing this action, but authorizing the filing of an Amended Declaration of Taking and any deposit that is made will take into consideration the deposit already on hand and the order made upon the original Declaration of Taking, for easement, will be vacated and held for naught and likewise, the Declaration of Taking upon which the order was based, and likewise, the Declaration of Taking which was executed on the 21st day of April, 1942, and filed in this cause the 22nd day of October, 1943, will be held for naught."

and formal order, embodying that ruling, was signed and entered November 12, 1943 (R. I, 75). (See also Court's remarks in the course of the argument R. I, 151, 158, 162, 165 and 166.)

That ruling and order became the law of the case, binding upon the court and the parties. It was so recognized by the trial court (R. I, 149 and 165). It is so as a matter of law.

> "The motion to dismiss the bill was granted unless the plaintiff within twenty days filed an amended bill stating a case for granting equitable relief. No application was made for a rehearing, and no appeal was taken from the decision. The insufficiency of the original complaint thereupon became res judicata in the subsequent proceeding before Judge Van Fleet." (Citing authorities.) *Presidio Mining Co.* vs. *Overton,* 261 Fed. 933, 939 (CCA 9).

> "The general rule is that where a party, after an order sustaining a demurrer to his pleading by leave of court, files an amended pleading, he is deemed to have acquiesced in the action of the court upon the demurrer and will not be permitted to appeal or assign such action as error in the appellate court." 2 *American Jurisprudence, Appeal and Error,* Sec. 207, 927.

To Summarize:

An officer of the United States does not *ex officio* have authority to acquire private property for public use. That authority must be delegated to him by act of Congress. The delegation of such authority must be clearly expressed though it need not be in express terms. It will be implied where there is an appropriation by Congress to pay for the lands sought to be taken. In neither of the statutes relied on in the first and second declarations of taking in this cause is there any such delegation or grant of authority, express or implied. Therefore, each of said declarations was a nullity. The order of the District Court so holding (R. I, 75), unexcepted and acquiesced in, became and is the law of the case.

5. The Statutes cited and relied on in the Third Declaration of Taking grant no authority to acquire.

The additional statutes relied on and set forth in the third declaration of taking filed in the cause grant to the Secretary of Agriculture no authority to

acquire the lands sought to be taken. They wholly fail to provide the authority which is lacking in the statutes originally relied on.

The third declaration of taking (R. I, 82) filed after the order of November 12, 1943, making the first two ineffective for any purpose, stated the authority relied on as authority to acquire as follows:

> "The lands hereinafter described are taken under and in accordance with an Act of Congress approved June 4, 1897 (30 Stat. 34-36), an Act of Congress approved November 9, 1921 (42 Stat. 218), an Act of Congress approved September 5, 1940 (54 Stat. 867), an Act of Congress approved July 12, 1943 (Public Law 129-76th Congress, Chapter 215-1st session), an Act of Congress approved July 13, 1943 (Public Law 146-78th Congress, Chapter 236-1st session), and acts supplementary thereto, and amendatory thereof, and the Department of Agriculture Appropriation Act, 1942 (c. 267, 1st session Pub. Law, 144-77th Congress), which authorize me in the name of the United States of America to acquire the lands described in the condemnation petition in the above-entitled proceeding and set forth hereinbelow."

Nothing need be added to what has already been said regarding the Act of June 4, 1897, which is herein referred to as the National Forest Administration Act, and the Department of Agriculture Appropriation Act, 1942, except to point out that the appropriations made by the latter Act were for the fiscal

year ending June 1942, and with their lapse on that date any authority sought to be implied therefrom terminated.

The other statutes relied on grant no authority to acquire lands.

(a) The Act of November 9, 1921 (42 Stat. 218), being the Federal Highway Act, 23 U.S.C.A. Sections 1 to 25, expressly negatives such authority because, as above pointed out, by definition, in Section 2 of that Act, "costs of rights of way" are expressly excluded from the connotation of the term "construction" as used in that Act.

(b) The Act of September 5, 1940 (54 Stat. 867), section 6 of which is set out in the Appendix hereto, granted no authority to acquire. It was not even an appropriation act. It was "An Act to amend the Federal Aid Act approved July 11, 1916, as amended and supplemented and for other purposes" by increasing the amounts *authorized* to be appropriated. Section 6 of that Act, authorized, *but did not make,* the appropriation of funds for the fiscal years ending June 30, 1942, and June 30, 1943, for the purposes of Section 23 of the Federal Highway Act, which purposes, we repeat, expressly excluded the acquisition of rights of way. Moreover, the years for which such appropriations were authorized had passed and the authorization had lost whatever virtue it may

have had prior to the making and filing of the third declaration of taking.

(c) The Act of July 12, 1942 being the Department of Agriculture Appropriation Act, 1944 (57 Stat. 392), is no more a grant of authority to acquire than the Department of Agriculture Appropriation Act, 1942, discussed above. Its provisions are in the stereotyped language of all the Department of Agriculture Appropriation Acts since that of 1936 and in all material respects are identical in language, though not in amounts, with those of the Appropriation Act of 1942. For the convenience of the Court the germane provisions of that Act are set out in the Appendix.

(d) The Act of July 13, 1943 (57 Stat. 560) does not expressly or by implication authorize the acquisition of lands by any officer of the United States. It grants no authority to the Secertary of Agriculture; he is not named or referred to therein.

Section 1 of that Act, which is set out in the Appendix hereto, amends the definition of the term "construction" in Section 2 of the Federal Highway Act approved November 9, 1921, to include "the costs of rights of way incidental to the construction of a highway, except locating, surveying, and mapping." This amendment, made after the passage and approval of the Department of Agriculture Appropri-

ation Act, 1944, cannot be read into that Appropriation Act so as to extend the appropriations made by the earlier Act to purposes not then authorized. Authority to acquire cannot be implied, and acquisition is not sanctioned by congressional appropriation for purposes which at the time of appropriation excluded "costs (and hence acquisition) of rights of way," because Congress, after making the appropriation for specific purposes changed the definitions in the Federal Highway Act and thereby enlarged its purposes.

The argument made on behalf of the United States appears to be that because the Federal Highway Act was amended after the passage and approval of the Department of Agriculture Appropriation Act, 1944, so that the term "construction" thereafter included "costs of rights of way," the appropriation in the Appropriation Act previously passed and approved, which was for the purposes of Section 23 of the Federal Highway Act, was thereby amended so as to be an appropriation for the enlarged purposes of the subsequently amended Highway Act. The fallacy of this argument was recognized by the District Court. (R. I, 157.)

The appropriation for the purposes of Section 23 of the Federal Highway Act was for those purposes, and those purposes only, which were within the scope

of the Highway Act as it read at the time the Appropriation Act became law. That appropriation was not and could not be broadened by the subsequent amendment of the Highway Act. Subsequent legislation cannot be a controlling factor in the construction of prior statutes, which must speak from their own date. *Grahl* vs. *U. S.,* 261 Fed. 487, 492 (CCA 7th). A statute must be construed as of the date of its passage. *Empire Voting Machine Co.* vs. *Chicago,* 267 Fed. 162, 168 (CCA 7th), Cert. Dend. 254 U. S. 462, 65 L. ed. 453.

The Supreme Court of the United States, in *Hassett* vs. *Welch,* 303 U. S. 303, 314, 82 L. ed. 858, 866, quotes 2 Lewis's Sutherland, Statutory Construction, 2nd Edition, pp. 787, 788, as a well-settled canon, as follows:

> "Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisons adopted had been incorporated bodily into the adopting statute . . . Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent."

> "The adoption in a local law of the provisions of a general law does not carry with it the adoption of changes afterwards made in the general law. This was so ruled in *Kendall* vs. *United*

States, 37 U. S. 12 Pet. 524, 625, 9 L. ed. 1181, 1221."

In re Heath
144 U. S. 92, 94, 36 L. ed. 358, 359.

"It is well settled that where a statute incorporates another, and the one incorporated is thereafter amended or repealed, the scope of the incorporating act remains intact and 'no subsequent legislation has ever been supposed to affect it'."

U. S. vs. *Mercur Corporation,*
83 Fed. (2d) 178, 180, (C. C. A. 2),
Per Augustus N. Hand, J.

50 *Amer. Juris., Statutes, Sec.* 39, p. 58.

Munoz vs. *Porto Rico Ry. Light & P. Co.,*
83 Fed. (2d) 262, at 266, (C. C. A. 1).

McLeod, Commissioner vs. *Commercial National Bank,* 178 S. W. (2d) 496, 497.

No authority to acquire private property having been granted to the Secretary of Agriculture, either expressly or by necessary implication, by the additional statutes relied on as such authority in the third declaration of taking filed November 12, 1943, appellant's motions to quash and adjudge the same null and void (R. I, 86, II, 250, and 331-2) should have been granted. *U. S.* vs. 72 *Acres,* 37 Fed. Supp. 297 (D. C. Cal.), Aff'd 124 Fed. (2d) 959 (CCA 9);

Puerto Rico Light & Power Co. vs. *U. S.,* 131 Fed. (2) 491 (CCA 1).

A. TAKING OF THE SO-CALLED "GRAVEL LANDS" IS IN ANY EVENT NOT AUTHORIZED

Specifications of Error Nos. 3, 4, 8, 26 and 40

Obviously, Appellant's general proposition that the proposed taking was wholly unauthorized includes this subsidiary proposition. If, however, it should by any chance be held that under one or more of the statutes relied on authority has been granted to the Secretary of Agriculture to acquire rights of way for roads, it does not follow that authority has been granted thereby to acquire other lands outside the Olympic National Forest which are sought to be acquired for purposes other than as rights of way.

Such authority cannot be predicated upon the appropriation "for maintenance of roads and trails." Such an appropriation is not one to pay for lands from which maintenance materials may be obtained. Conceding that "when legislative authority to do a specific thing is conferred, the power to do all things reasonably necessary to its achievement is impliedly granted," it does not follow that an appropriation to pay costs of maintenance sanctions the acquisition of private property from which gravel or other materials useful or desirable in effecting the authorized

maintenance may be obtained. Such an appropriation would not sanction the taking of an asphalt lake or crude oil and oil refining plant in California merely because the asphalt or oil produced therefrom might be used or useful in maintaining roads in the Olympic National Forest in Washington, or the taking of a limestone quarry or cement manufacturing plant for a similar reason. Such a holding is not within the rule that an appropriation to pay for lands sanctions the acquisition thereof. *U. S.* vs. 458.95 *Acres,* 22 Fed. Supp. 1017, at 1020. It runs counter to the rule that the grant of authority to acquire must be clearly expressed. *Delaware L. & W. R. R. Co.* vs. *Morristown,* 276 U. S. 182, 72 L. ed. 523. Such a holding involves a double implication: First, that ownership of lands wherever found, from which road maintenance materials may be derived is necessary to maintain the roads, and then that the acquisition of such lands is sanctioned by an appropriation to pay costs of maintenance. Roads cannot be *constructed* without the rights of way on which to build them, but once built may be *maintained,* and in many if not the majority of cases are *maintained,* without ownership of the lands or other facilities from which the maintenance materials are derived or produced.

Furthermore, under the evidence, the taking of these lands was wholly unauthorized. They lie out-

side the boundaries of the Olympic National Forest. According to the Government witness, they were useful only for growing trees (R. II, 495; III, 534 and 536). They are within a part of the area certified as the Polson Tree Farm. Congress alone may make additions to the Olympic National Forest. 16 U. S. C. A. Sec. 471(a). The acquisition of 100 acres of land contiguous to but wholly outside of the Olympic National Forest and useful only for growing trees can be nothing but an addition to that forest.

At the conclusion of the Government's case, appellant moved to dismiss the action as to these lands on the ground that the taking was not for any authorized purpose but merely to enlarge the boundaries of the Olympic National Forest (R. III, 537, Specification of Error No. 25).

The trial court indicated doubt as to what his ruling should be (R. III, 538-540); whereupon the Government asked and obtained leave to reopen its case. The only testimony then offered was that of Paul H. Logan (R. III, 567-568) to the effect that subsequent to his previous testimony he had examined the records in the Regional Office of the Forest Service at Portland to prepare himself to testify as to the *purpose* for which Tracts 2 and 3 were taken, and that purpose was to obtain gravel there "for the construction and maintenance of roads

in the West Fork of the Humptulips area." The Government offered no testimony that these lands are gravel-bearing or that they will serve the purpose for which it is alleged they are taken.

It is submitted that the express congressional prohibition against additions to the Olympic National Forest cannot be circumvented by the *ipse dixit* of the Secretary of Agriculture or of the United States Forest Service that forest lands are being acquired for the gravel which they may or may not contain.

B. and C. CONFIRMATION OR VALIDATION OF POSSESSION TAKEN PRIOR TO NOVEMBER 12, 1943, WAS ERRONEOUS

Specification of Error Nos. 5 and 40

As previously stated, the District Court, on November 12, 1943, entered its order adjudging the first and second declarations of taking without authority and of no effect and dismissing the original and amended petition in condemnation (R. I, 75). The Government acquiesced in that ruling and thereafter, but on the same day filed the third declaration of taking (R. I, 82), and later, on May 23, 1944, a second amended petition in condemnation (R. I, 92). The order of November 12, 1943, was entered in the July 1943 term of the District Court.

Appellant moved against the third declaration

of taking on the ground that the Secretary of Agriculture was without authority to acquire the lands sought to be taken (R. I, 86). That motion was denied and the Government's motion for judgment on said declaration of taking granted by order made and entered May 23, 1944, which was in the following, or February 1944, term of the District Court (R. I, 99). Paragraph (4) of that Order is as follows:

> "(4) The Court on its own motion, and after due consideration, further Orders, Adjudges and Decrees that the order of this Court entered herein on November 12, 1943, be and the same is hereby modified by vacating and setting aside any and all parts of said order which may be interpreted as denying the authority of the Secretary of Agriculture to condemn land in the manner and for the purposes set forth in the original and amended petitions in condemnation on file herein at the time of entry of said order."

The judgment on the declaration of taking entered pursuant thereto (R. I, 108), among other things, provided as follows:

> "It is further Adjudged that the possession taken by the petitioner, United States of America on or about February 5th, 1942 of that portion of the above described property which is described in the original petition in condemnation and declaration of taking filed herein on January 21, 1942, and taken pursuant to the judgment on said declaration of taking entered herein on January 23, 1942, be and the same is hereby confirmed as of the date such possession was taken; and pos-

session of the remainder of the property above described or any portion thereof not heretofore taken by the petitioner, is hereby granted as of the date of this judgment."

The Government, if it had deemed the District Court's order of November 12, 1943, erroneous, could have stood thereon, suffered the action to be dismissed, and appealed to this court. It did not do so, nor did it at any time move to vacate, set aside or in any way amend said order. That order, through lapse of time and the ending of the July 1943 term of the District Court, became final, so that the District Court was *without jurisdiction* on May 23, 1944, more than six months later, to set aside, modify or correct it.

Bronson vs. *Schulten,*
104 U. S. 410, 26 L. ed. 797;

Hazel Atlas Glass Co. vs. *Hartford Empire Company,* 320 U. S. 732, 88 L. ed. 433.

Compare Rule 60 of *Rules of Civil Procedure.*

But, passing the question of jurisdiction, the ruling embodied in that order became the law of the case and *res judicata* as to the insufficiency of the first and second declarations of taking.

Presidio Mining Co. vs. *Overton,*
261 Fed. 933, at 939 (CCA 9th);

2 *Amer. Juris. Appeal & Error,*
Sec. 207, p. 972.

Moreover, in view of the rulings and orders of the District Court, the Government, by filing the third declaration of taking, must be conclusively presumed to have waived or abandoned the earlier declarations and to be relying on the third and last declaration of taking filed.

The letter of the Under Secretary of Agriculture transmitting the third declaration of taking to the Attorney General for filing, states:

> "The enclosed declaration of taking is submitted for use in lieu of the declaration of taking forwarded to you with my letter of April 21, 1942."

The original petition in condemnation filed January 21, 1942 (R. I, 2) and the amended petition in condemnation filed October 22, 1943, were dismissed by order of the District Court dated November 12, 1943 (R. I, 75, 78) "but without prejudice to the filing of a new or amended petition herein." That order of dismissal was never vacated, set aside or in any way modified, but pursuant thereto a second amended petition in condemnation was filed May 23, 1944 (R. I, 92), paragraph VI of which alleges the filing of the third declaration of taking but makes no reference to the earlier declarations.

Such waiver or abandonment was confirmed subsequent to May 23, 1944. On September 18, 1945, the Government moved to amend the third declaration of taking and all subsequent pleadings to correct the description of Line F (R. II, 242). The motion was granted by order entered September 20, 1945 (R. II, 246). Neither the motion nor the order referred or in any way related to either the first declaration of taking (R. I, 16), which, however, did not cover Line F, or the second declaration of taking (R. I, 60), which has the same erroneous description as was contained in the third declaration prior to its amendment. The case proceeded to trial on the second amended petition in condemnation as so amended and Appellant's answer thereto (R. II, 259). On the trial, the Government offered no evidence as to the date possession was taken, notwithstanding the allegations of its second amended petition relative thereto were denied by Appellant's answer and notwithstanding those allegations were *prima facie* and patently erroneous.

The original declaration of taking related to a *non-exclusive easement* only. Such possession as was taken under that declaration, if any, was therefore not exclusive of Appellant, for it will not be presumed that the Government trespassed beyond the rights asserted in that declaration. Further, the original declaration covered only a portion of the

lands covered by the second declaration of taking. It did not cover Lines H, I, J, K, F and L, nor Tracts L, 2 and 3, as will be readily apparent by comparison of the maps attached to said declarations (R. I, 19 and 63.

No judgment was ever entered on the second declaration of taking but it was held "unauthorized and insufficient to vest title in the United States of America to any of the lands or property therein described and .... of no effect whatsoever," by order entered November 12, 1943 (R. I, 77). This second declaration of taking was superseded by a third declaration of taking which was filed "in lieu" of the second, on November 12, 1943, but no judgment on the third declaration was entered until May 23, 1944. (R. I, 108.)

Under the Act of February 26, 1931 (46 Stat. 1421, 40 U. S. C. A. 258(a), if the taking was authorized by the statutes cited in the third declaration, title to the lands described therein vested in the United States upon its filing, to-wit, on November 12, 1943, *and not before.*

That Act provides:

> "Upon the filing of a declaration of taking, the Court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner."

Under that provision the Court cannot require the appellant, as the party in possession, to surrender possession prior to the filing of the declaration of taking (in this case prior to November 12, 1943), nor confirm a possesion adversely taken or asserted prior thereto. The judgment on the declaration of taking entered May 23, 1944 (R. I, 108) was therefore in any event erroneous in so far as it purports to confirm as of the date of the taking thereof whatever possession was taken prior to May 23, 1944, but without fixing the date or dates or defining the property involved (R. I, 112), since the effect thereof is to deprive Appellant of its property, i.e., its right to possession and the fruits thereof, without due process of law in violation of the due process and eminent domain clauses of the Fifth Amendment to the Constitution of the United States and of the Ninth Amendment to the Constitution of the State of Washington.

In this connection, brief reference should be made to Specifications of Error 9 and 10, which challenge the District Court's order and instruction fixing the date of taking, and consequentially the date of valuation, as of October 22, 1943, the date of the filing of the second declaration of taking.

It is submitted that for the reasons and on the authorities hereinbefore presented, there was no

valid or effective taking of appellant's property; but if there were, it was not, and under the record here made could not have been, until the filing of the third declaration of taking on November 12, 1943. In either event, Specifications of Error 9 and 10 are well taken and should be sustained.

II.

A. DETERMINATION OF JUST COMPENSATION INCLUDES CONSIDERATION OF THE USE FOR WHICH THE PROPERTY IS TAKEN

Specifications of Error 11, 12, 13, 14, 15, 16, 17, 19, 23, 25, and 39

Appellant concedes that value to the condemner of the use for which the property is taken is not the test, or a test, of just compensation.

The value to the Government of the use of the roads taken will be reflected in and measured by the increased value of or increased stumpage prices received for its timber which will be taken out over these roads. Appellant made no attempt to prove any such value and makes no contention here that it had the right and should have been permitted to do so.

On the other hand, Apellant believes the rule to be unquestioned and indisputable that if the property condemned is at the time of taking available or adaptable for the use for which taken, then that fact

may be shown and taken into account and if that fact would increase the price negotiated between a willing buyer and a willing seller, then such use and the value attributable thereto are to be considered in determining just compensation.

Such is the rule in the Federal courts:

Mississippi & Rum River Boom Co. vs. Patterson, 98 U. S. 403, 25 L. Ed. 206;

United States vs. Chandler Dunbar Water Power Company, 229 U. S. 53, 57 L. Ed. 1063;

Olson vs. U. S., 292 U. S. 246, 255, 78 L. Ed. 1236;

Washington Water Power Co. vs. United States, 135 Fed. (2d) 541 (C. C. A. 9);

United States vs. Waterhouse, 132 Fed. (2d) 699 (C. C. A. 9);

Great Falls Manufacturing Company vs. United States, 16 Ct. Cl., 160, 198; affirmed *U. S. vs. Great Falls Manufacturing Co.,* 112 U. S. 464, 28 L. Ed. 846.

It is the rule in the State of Washington:

Columbia and Cowlitz River Boom and Rafting Company vs. Hutchinson, 56 Wash. 323, 105 Pac. 636;

Ham, Yearsley & Ryrie vs. Northern Pacific Railway Company, 107 Wash. 378, 181 Pac. 898.

It is the rule generally:

San Diego Land & Town Company vs. Neale, 78 Cal. 63, 20 Pac. 372, 88 Cal. 50, 25 Pac. 977;

Emmons vs. Utilities Power Company, 83 N. H. 181, 141 Atl. 65;

Oregon Railway and Navigation Company vs. Taffe, 67 Ore. 102, 134 Pac. 1024, 135 Pac. 332;

Nantahala Power & Light Co. vs. Moss, 17 S. E. (2d) 10;

Decatur Park District vs. Becker, 368 Ill. 442, 14 N. E. (2d) 490, 493;

Shurtleff vs. Salt Lake City, 96 Utah 21, 82 Pac. (2d) 561, 564.

In *Mississippi & Rum River Boom Co. vs. Patterson,* 98 U. S. 403, 25 L. Ed. 206, plaintiff in error was a corporation created under the laws of Minnesota to construct booms for the holding and rafting of logs on the Mississippi and Rum Rivers. It

sought to acquire by condemnation for booming purposes three islands in the Mississippi River, the position of which "specially fitted them, in connection with the West bank of the river, to form a boom of extensive dimensions, capable of holding with safety from twenty to thirty million feet of logs." The issue before the Supreme Court was the compensation to be made to the owner. Mr. Justice Field, speaking for the unanimous court, said:

> ". . . as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.
>
> "The position of the three islands in the Mississippi fitted them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The Boom Company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river; as, by utilizing them in the manner proposed, they would save heavy expenditure of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." (Opin. p. 209.)

In *United States vs. Chandler-Dunbar Water Power Company,* 229 U. S. 53, 57 L. Ed. 1063, the

United States sought to acquire certain lands for the construction of a ship canal. It took exception to the inclusion as an element of value of the availability of the land taken for lock and canal purposes. The Supreme Court overruled that exception, saying:

> "The exception taken to the inclusion as an element of value of the availability of these parcels of land for lock and canal purposes must be overruled. That this land had a prospective value for the purpose of constructing a canal and lock parallel with those in use had passed beyond the region of the purely conjectural or speculative. That one or more additional canals and locks would be needed to meet the increasing demands of lake traffic was an immediate probability. This land was the only land available for the purpose. It included all the land between the canals in use and the bank of the river. Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, it is proper to consider the fact that the property is so situated that it will probably be desired and available for such purpose."

In the *Columbia and Cowlitz River Boom and Rafting Company* case, 56 Wash. 323, 105 Pac. 636, the Booming Company sought to condemn certain lands necessary for their booming and rafting operations. The principle issue before the Supreme Court of the State was a claim of excessive compensation, appellant claiming the trial court had erroneously instructed the jury that in making up their

verdict they could take into consideration the value of respondent's premises as a boom site, i.e., their value for the purpose for which they were being acquired. Judgment was affirmed, the Supreme Court saying:

> "Whether the verdict was in fact excessive is a more difficult question. Based upon the value of the land for agricultural purposes, it could not be justified under the most favorable view of the evidence. But the land was valuable as a boom site, and the jury had the right to take that fact into consideration in making up their verdict; and in viewing the verdict in the light of such fact we are unable to say it is excessive. . . .
>
> "The instruction of the court given in this case, to the effect that the jury in making up their verdict could take into consideration the value of respondents' premises as a boom site, does not conflict with the rule announced by this court in the case of *Grays Harbor Boom Co. vs. Lownsdale,* 54 Wash. 83, 102 Pac. 1041, 104 Pac. 267."

In *Ham, Yearsley & Ryrie vs. Northern Pacific Railway Company,* 107 Wash. 378, 181 Pac. 898, plaintiff sought to condemn for the construction and maintenance of a dam site certain lands previously acquired for public purposes by the Railway Company. Instruction number six given by the Court was:

> "In estimating the value of the real estate

you may consider all of its capabilities and all of the uses to which it is applied, and for which it is adapted, but you shall not consider the fact, if you find such fact to be, of the unwillingness of the owner to sell or dispose of said property."

Cf. District Court's Instructions, R. III, 763, 764.

The Trial Court then further instructed the jury, instruction number seven:

". . . that, in ascertaining the value of damage, they 'must not take into consideration any special value which said property may have to the petitioner by reason of its necessity, but the market value as hereinbefore defined to you; nor should you take into consideration the value of defendants' property as a dam site'."

Compare District Court's instructions here, as follows:

"Potential uses of this property can not be considered by you insofar as they apply to or depend upon any uses to which the government itself may put the property after having acquired it. If, in this case, you find the highest and best use of the property is for truck or road purposes, then you will take into consideration the wants or needs as such may reasonably be expected in the near future by those who would make use of this property, but not including in such wants and needs the hauling of any forest timber and products which were not sold or marketed on the day the government first took possession of the property here in question." (R. III, 763-764)

and again:

> "And in that connection, I instruct you again, as I have heretofore, and probably shall further, that when the uses of this property was taken into consideration by the prospective buyer and prospective seller, those uses can not include any earnings that the property may make by reason of having transported thereover any timber that grows in the national forest that may be contiguous to it, or within the watershed." (R. 766-767)

and again:

> ". . . Any special value that the road may have to the government for use in connection with its national forest must be excluded by you as an element of market value. The fact that there is a large stand of national forest timber which may be logged in the future and hauled out over this road must not be considered by you as an element of damage; therefore, in considering this case, no allowance may be made for any value that a prospective purchaser would place upon this land as a road over which the government owned timber would necessarily move." (R. III, 768)

In the Washington case, appellant assigned error on the giving of Instruction number seven, which assignment was sustained, the court saying:

> "In instruction number seven the respondent insists that the trial court adhered to the rule which held to the market value for all purposes, and clearly, specially and unmistakably told the

> jury that, in their determination of the land, they could consider its adaptability for a dam site. This is certainly not correct when we find in the instruction that the court told the jury they were not to take into consideration the value of the land for a dam site."

then, after citing and quoting from Boom Company vs. Patterson, 98 U. S. 403, supra, Lewis on Eminent Domain, 10 R. C. L. Eminent Domain, Par. 114, concluded as follows:

> "It is true that the owner is not permitted to take advantage of the necessities of the condemning party, but neither can the condemner obtain something of value for nothing. Under the rule fixing the market value at the time of taking, obtaining in this state, and in determining that value, it is proper to show the condition of the property, its surroundings, the uses to which it has been applied, and its capacity for other uses, including that to which it is sought to be applied, in estimating its value, but no showing may be made of its value for any special use; the value of the use for which it is sought may be more or less than its market value." Opin. 107 Wash. 383, 389.

In ruling in a similar situation, the Supreme Court of New Hampshire, in *Emmons vs. Utilities Power Company,* 83 N. H. 181, 141 Atl. 65, said:

> "In the ascertainment of the value of the property invaded, she (the land owner) is entitled to have it appraised for the most profitable purpose, or advantageous use, to which it could be

put on the day it was taken. (Citing cases.) It appears to be conceded that flowage is the most profitable use to which the plaintiff's property can be put.

"There is no rule of law that the value of land taken by eminent domain is measured solely by its capacity for valuable uses in and of itself without regard to such external elements, if any, as would probably have affected the judgment of a purchaser at a fairly conducted sale." (Opin. 414 Atl. p. 67)

In *Decatur Park District vs. Becker,* 14 N. E. (2) 490, the Supreme Court of Illinois said:

"The value of the land taken to the party taking it, is not the test of what should be paid. If, however, entirely apart from the fact that the property was taken for a particular use, it appears that it was exceptionally adapted and available for such use, and the necessity for such use was so imminent as to add something to the present value in the minds of possible buyers, that element may be considered in determining the fair cash market value." (Opin. p. 493.)

Demonstration that the appellant is entitled to the benefit of this rule and that the District Court erred to appellant's prejudice in not recognizing or in misapplying it, requires a somewhat more detailed statement of the facts.

With the exception of Tracts 2 and 3 comprising 100 acres, the lands involved in this case (which for

convenience of designation are sometimes referred to as the "lands taken" or the "roads taken" without intending thereby to imply or admit that the "taking" was valid or effective for any purpose) consist of road rights of way with the highly improved auto truck roads constructed by or for the account of Polson Logging Company thereon. These roads are designated on the maps attached to the third declaration of taking (R. I, 63) as Lines A, B, C, D, H, I, J, K, F, and L. As shown on said maps and on Exhibits 1 and 2 and A2, the principal road system extends from a junction with U. S. Highway 101 in Section 35, Township 21 North, Range 10 West, Willamette Meridian, northerly across that township and Township 21 North, Range 9 West, Willamette Meridian, following up the valley of the West Fork of the Humptulips River to the south line of the Olympic National Forest, which they tap at five different points in Sections 2, 3 and 5 of Township 21 North, Range 9 West. In addition, there is a short section of road, Lines F and L, which, although actually connected with the main system, may for present purposes be treated as independent thereof since the Government has not sought to acquire or take the intervening or connecting road. This short section of road extends from a junction with U. S. Highway 101 in Section 11, Township 21 North, Range 10 West, Willamette

Meridian, eastwardly to the boundary of the Olympic National Forest on the west line of Section 6, Township 21 North, Range 9 West.

There are 15.53 miles of these roads (R. II, 347-350) inclusive of the portion that crosses the state-owned school section (Section 16, Township 21 North, Range 9 West), but exclusive of the roads on and crossing Tracks 2 and 3 which extend to and tap the Olympic National Forest in Section 4, Township 21 North, Range 9 West, and also connect Lines J and K. The greater part of these roads had been originally constructed and for many years used as logging railroads. Later, and prior to any purported taking by the Government, they had been converted into truck roads by the removal of the railroad rails and ties and ballasting and surfacing with gravel. Having been originally constructed as railroad grades, the maximum curvature was 10 degrees (R. III, 598) and the grade from the northern termini to the junction with U. S. Highway 101 (the hard-surfaced arterial highway leading to Grays Harbor and market) was all down-grade with a maximum gradient of .5%, except for a 2% adverse grade for about 2000 feet west of the bridge crossing the West Fork of the Humptulips River (R. III, 597). Thus they constitute a nearly ideal system of truck logging roads, not only for the logging and removal of any timber remaining or hereafter grown upon the

lands which they traverse, but for the logging and removal of the timber in the Olympic National Forest to the north, which will be drained down or funnelled out over these roads as naturally as the surface waters in that area of the National Forest are drained by the West Fork of the Humptulips River and its tributaries which these roads follow. (See Exhibits 1 and 2 and A2.) The estimated cost to reproduce new these roads, exclusive of the portion crossing school section 16 and the bridges over Stevens and O'Brien Creeks, as of the date of valuation fixed by the Court, was $214,647.23 (R. III, 682) and the estimated accrued depreciation to that date was $20,632.85 (R. III, 690). The bridges over Stevens and O'Brien Creeks were not included in these estimates because the United States Forest Service had subsequent to October 22, 1943, elected to replace the former with a new bridge and the latter with a culvert and extensive fill.

In the portion of the Olympic National Forest which lies immediately north of the townships traversed by these roads and which is known as the Humptulips Basin or, in Forest Service parlance, as the Humptulips Working Circle, there is a large stand of mature timber conservatively estimated by Lester M. Edge, Logging Engineer for the Olympic National Forest, at from one billion to one billion four hundred million feet (R. II, 375), and by others

at even larger amounts. It is "the last stand of virgin timber that can feed Grays Harbor." (W. H. Abel, R. II, 472.) It is the body of timber that will be tapped by these roads, and the quantity that the Government's Logging Engineer Edge, after examing the roads "with the idea in mind to transport timber from the Olympic National Forest on the north to the main Olympic Highway (R. II, 355), figures will come out over them.

From 1939 to October or November, 1943, the use of these roads or portions of them was hired from Appellant by the M. & D. Timber Company, and Messrs. McKay, Johnson, and perhaps others, for the transportation and removal of logs, both government and privately owned, cut by them on lands within the National Forest, and of timber owned by third parties on lands tributary to those roads but outside the Forest.

These roads, beyond question were adaptable and available for the removal of the timber in that Forest. That was admitted by the Court and conceded by the Government (R. III, 629, 630) and implicit in the Court's instructions to the jury (R. III, 768). It was reasonably probable that the timber in the Olympic National Forest would move out over and by means of these roads. See Testimony of Government's witnesses Logan (R. II, 500-504) and Abel (R. II, 472-478).

Fundamentally, then, the Court erred to the prejudice of appellant in ruling "that what timber there is in this National Forest that is contiguous to this—and moves out over the road, cannot be a factor in fixing market value of the road," (R. III, 672) (cf. Specification of Error 18), and in instructting the jury as follows:

> "Potential uses of this property cannot be considered by you insofar as they apply to or depend upon any uses to which the government itself may put the property after having acquired it. If, in this case, you find the highest and best use of this property is for truck or road purposes, then you will take into consideration the wants or needs as such may reasonably be expected in the near future by those who would make use of this property, but not including in such wants and needs the hauling of any forest timber and products which were not sold or marketed on the day the government first took possession of the property here in question." (R. III, 764)

> "The fact that there is a large stand of national forest timber which may be logged in the future and hauled out over this road must not be considered by you as an element of damage; therefore, in considering this case, no allowance may be made for any value that a prospective purchaser would place upon this land as a road over which the government owned timber would necessarily move." (R. III, 768)

> "You can allow only such value for the lands

taken which you believe a private purchaser, acting as a reasonably prudent person, and being an informed man, would pay for it, knowing that he could not anticipate any earnings or revenues that he might derive by reason of the national forest timber which is in the Humptulips Watershed." (R. III, 768)

(Cf. Specifications of Error 14, 16 and 17.)

It is implicit in that ruling and those instructions that the roads taken were available and adaptable for the removal of a billion feet and more of timber in the National Forest and that that timber would "*necessarily*" move out over these roads and that a prospective purchaser would pay an increased price because of those facts.

Such instructions required the jury to determine compensation without consideration of the highest and best use to which the lands taken could be put. They violate every element of the rule above set out as to the matters to be considered in determining just compensation.

This highly prejudicial error is pointed up by the testimony of the Government's witnesses LaSalle (R. II, 444), Abel (R. II, 466), Logan (R. II, 508), and Porteous (R. II, 517), all to the effect that in placing a value on the property taken they ignored the fact that it was a truck logging road and wholly disregarded the use to which the Government in-

tended to put it.

It is further pointed up by the fact that appellant's witness Hobe, whose qualifications as an expert witness on market value were not questioned (R. III, 728), after testifying that an owner willing, but not compelled, to sell, and a buyer willing, but not compelled, to buy, in negotiating for the sale of the property taken would have given consideration to the Government owned timber in the Olympic National Forest to the north of the roads and that that consideration would have influenced the market value of the roads under condemnation (R. III, 725, 726), was not permitted to state his opinion as to market value because it took into consideration the very factors which would have been given weight by a hypothetical buyer and seller and would have influenced the market value (R. III, 727, 728) (Cf. Specification of Error 33).

As put by this Court in *Washington Water Power Company vs. U. S.*, 135 Fed. (2d) 541, at 543:

> "Accordingly the rule is that a witness may base his appraisal on the 'highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future' . . .
>
> "This simply means that if it was 'reasonably probable' that the land would be used for the use testified to, evidence of its value for such

use is admissible, but if not, then the evidence is inadmissible."

(Cf. U. S. vs. Waterhouse, 132 Fed. (2d) 699, at 703 (C. C. A. 9.)

The District Court not only violated and disregarded the rule that if it was reasonably probable that the land would be used for the purpose for which it was taken then such use and the value attributable thereto are to be considered in determining just compensation, but exaggerated that error and committed further error by refusing evidence offered by the appellant to show (1) that the roads taken were available and adaptable for the purpose for which taken, to-wit, the removal of timber from the Olympic National Forest; (2) that it was reasonably probable that the roads taken would be used for that purpose, and (3) the market value attributable to such use.

If under the declaration of taking and the evidence of the Government's witnesses it was reasonably probable that the roads taken would be used for the removal of timber from the National Forest, which fact was, as hereinabove pointed out, assumed and admitted by the District Court and in part, of not wholly, conceded by the Government, then it was error to reject appellant's proffered testimony of market value which took into consideration the value attributable to that use and it was further error to in-

struct the jury that in determining market value no consideration could be given to that use.

But if the reasonable probability of such use was not admitted or conceded or accepted by the Court as established by the Government's action and the testimony of the Government's witnesses, then it was error for the Court to refuse evidence tending to estabilsh such reasonable probability.

Wherefore, it is submitted that the Court erred:

(1) In refusing evidence as to and rejecting Appellant's proof of:

(a) The adaptability and availability of the roads taken for the use for which they were taken. (Specifications of Error 19, 20, 22, 25, 38 and 39);

(b) The reasonable probability of such use. (Specifications of Error 19, 20, 21, 26, 36 and 37);

(c) Market value in the light of the reasonable probability of such use. (Specifications of Error 23, 27, 28, 29, 30, 31, 32, 33, 34 and 35).

(2) In instructing the jury as set out in Specifications of Error 14, 15, 16 and 17.

(3) In refusing Appellant's Requested instructions Nos. 3, 8 and 13. (Specifications of Error 11, 12 and 13.)

B. EARNINGS REASONABLY TO BE EXPECTED FROM THE USE OF PROPERTY BEING CONDEMNED FOR THE PURPOSES FOR WHICH THAT PROPERTY IS TAKEN MAY BE CONSIDERED IN DETERMINING MARKET VALUE AND JUST COMPENSATION.

Specifications of Error 19, 20, 21, 23, 25, 26, 29, 30, 31, 33, 35, 36, and 37.

It is the rule of this circuit that "capitalization of rental value is evidence of the market value of the land." *U. S.* vs. *Waterhouse,* 132 Fed. (2D) 699, 702, citing:

> *North American Tel. Co.* vs. *Northern Pacific Ry . Co.,* 254 Fed. 417, Cert. Den. 249 U. S. 607, 39 Sup. Ct. 290, 63 L. ed. 799 (CCA 8);
>
> *U. S.* vs. *Shingle,* 91 Fed. (2d) 85, 89, Cert. Den. 302 U. S. 746, 58 Sup. Ct. 264, 82 L. ed. 577.

Here the evidence disclosed the availability of the roads taken for the removal of one billion to one billion four hundred million feet of mature virgin timber, that the government expected that quantity of timber to move out from the Olympic National Forest over these roads, that some part of that timber had been so removed prior to the

purported taking, and that appellant had received rental for such use of these roads. Appelant's proffered proof that the timber in the area of the Olympic National Forest known as the Humptulips Basin or Humptulips Working Circle would be removed over these roads (Specifications of Error 20, 21, 22, 26, 27) of the rate at which the Government expected to remove that timber (Specifications of Error 36 and 37), that a rental of $1.50 per thousand feet would have been paid for the use of its roads for that purpose (Specification of Error 23), and of the market value of the lands taken, taking these factors into consideration (Specifications of Error 29, 30, 31, 33 and 35), was rejected. In so doing, the District Court erred to Appellant's prejudice.

WHEREFORE, the judgment of the District Court should be reversed and the cause remanded.

(a) With instructions to vacate and adjudge null and void the third declaration of taking, filed November 12, 1943, and to dismiss the second amended petition in condemnation and this proceeding; or, in any event, to quash, set aside and vacate the judgment on the declaration of taking entered May 23, 1944, in so far as it finds and adjudges the Secretary of Agriculture is authorized and empowered to acquire the so-called "gravel lands" (Tracts 2 and 3) and in so far as it confirms any possession taken

prior to November 12, 1943, and to dismiss the second amended petition in condemnation and this proceeding as to Tracts 2 and 3;

(b) If the third declaration of taking is not wholly set aside and adjudged void and of no effect and the proceeding dismissed, then with instructions to set aside the judgment on the verdict and grant Appellant a new trial; and

(c) With such further instructions as this Honorable Court may deem just and proper in the premises.

Respectfully submitted,

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Attorneys for Appellant,
Polson Logging Company.

Appendix

DEPARTMENT OF AGRICULTURE APPROPRIATION ACT, 1942

CHAPTER 267 — 1ST SESSION

PUBLIC LAW 144 - 77TH CONGRESS

(H. R. 3735)

An Act making appropriations for the Department of Agriculture for the fiscal year ending June 30, 1942, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Agriculture for the fiscal year ending June 30, 1942, namely:

* * *

FOREST SERVICE

Salaries and Expenses

* * *

National forest protection and management: For

the administration, protection, use, maintenance, improvement and development of the national forests, including the establishment and maintenance of forest tree nurseries, including the procurement of tree seed and nursery stock by purchase, production, or otherwise, seeding and tree planting and the care of plantations and young growth; the maintenance and operation of aerial fire control by contract or otherwise; the maintenance of roads and trails and the construction and maintenance of all other improvements necessary for the proper and economical administration, protection, development, and use of the national forests, including experimental areas under Forest Service administration: *Provided,* That where, in the opinion of the Secretary of Agriculture, direct purchases will be more economical than construction, improvements may be purchased; the construction, equipment, and maintenance of sanitary, fire preventative, and recreational facilities; control of destructive forest tree diseases and insects; timber cultural operations; development and application of fish and game management plans; propagation and transplanting of plants suitable for planting on semiarid portions of the national forests, estimating and appraising of timber and other resources and development and application of plans for their effective management, sale, and use; examination, classification, surveying, and appraisal of land incident

to effecting exchanges authorized by law and of lands within the boundaries of the national forests that may be opened to homestead settlement and entry under the Act of June 11, 1906, and the Act of August 10, 1912 (16 U. S. C. 506-509), as provided by the Act of March 4, 1913 (16 U. S. C. 512); and all expenses necessary for the use, maintenance, improvement, protection, and general administration of the national forests, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted under the Act of March 1, 1911 (16 U. S. C. 521), and the Act of June 7, 1924 (16 U. S. C. 471, 499, 505, 564-570), lands transferred by authority of the Secretary of Agriculture from the Resettlement Administration to the Forest Service, and lands transferred to the Forest Service under authority of the Bankhead-Jones Farm Tenant Act, $11,050,411, of which $14,411 shall be transferred to and made a part of the appropriation, "Salaries and expenses, Bureau of Agricultural Economics": *Provided,* That $200 of this appropriation shall be available for the expenses of properly caring for the graves of fire fighters buried at Wallace, Idaho; Newport, Washington; and Saint Maries, Idaho: *Provided further,* That in sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by the Act of May

23, 1908 (16 U. S. C. 500), and the Act of March 4, 1913 (16 U. S. C. 501), shall be based upon the stumpage value of the timber.

* * *

Acquisition of Lands for National Forests

For the acquisition of forest lands under the provisions of the Act approved March 1, 1911, as amended (16 U. S. C. 513-519, 521), including the transfer to the Office of the Solicitor of such funds for the employment by that office of persons and means in the District of Columbia and elsewhere as may be necessary in connection with the acquisition of such lands, $1,797,348, of which $9,348 shall be transferred to and made a part of the appropriation, "Salaries and Expenses, Bureau of Agricultural Economics": *Provided,* That not to exceed $80,000 of the sum appropriated in this paragraph may be expended for departmental personal services in the District of Columbia.

* * *

FOREST ROADS AND TRAILS

For carrying out the provisions of Section 23 of the Federal Highway Act approved November 9, 1921 (23 U. S. C. 23), including not to exceed $59,500 for departmental personal services in the District of

Columbia, $9,990,165 of which $34,665 shall be transferred to and made a part of the appropriation, "Salaries and expenses, Bureau of Agricultural Economics," which sum is a part of the balance of the amount authorized to be appropriated for the fiscal year 1941 by the Act approved June 8, 1938 (52 Stat. 635), to be immediately available and to remain available until expended: *Provided,* That this appropriation shall be available for the rental, purchase, or construction of buildings necessary for the storage and repair of equipment and supplies used for road and trail construction and maintenance, but the total cost of any such building purchased or constructed under this authorization shall not exceed $7,500: *Provided further,* That there shall be available from this appropriation not to exceed $5,000 for the purchase of land and $45,000 for the construction of a building at Missoula, Montana, for the storage and repair of Government equipment for use in the construction and maintenance of roads.

* * *

FEDERAL HIGHWAY ACT OF 1940

CHAPTER 715 - 3D SESSION

(PUBLIC NO. 780 - 76TH CONGRESS)

(H. R. 9575)

An Act to amend the Federal Aid Act, approved July 11, 1916, as amended and supplemented, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

* * *

Sec. 6. For the purpose of carrying out the provisions of Section 23 of the Federal Highway Act (42 Stat. 218), as amended and supplemented, there is hereby authorized to be appropriated (1) for forest highways the sum of $7,000,000 for the fiscal year ending June 30, 1942, and the sum of $7,000,000 for the fiscal year ending June 30, 1943: *Provided,* That hereafter appropriations for forest highways shall be administered in conformity with the regulations jointly approved by the Secretary of Agriculture and the Federal Works Administrator; and (2) for forest development, roads and trails the sum of $3,000,000 for the fiscal year ending June 30, 1942, and the sum of $3,000,000 for the fiscal year ending June 30, 1943: *And provided further,* That the apportionment for forest highways in Alaska shall be for each of the fiscal years $500,000 and that such additional amount as otherwise would have been apportioned to Alaska for each of said fiscal years shall be apportioned among those States, including Puerto

Rico, whose forest highway apportionment for such fiscal year otherwise would be less than 1 per centum of the entire apportionment for forest highways for that fiscal year: *And provided further,* That apportionments among those States, including Puerto Rico, whose forest highway apportionments for such fiscal year otherwise would be less than 1 per centum of the entire apportionment for forest highways for that fiscal year may be made without regard to the provisions of said Section 23 relating to apportionments, but in no case shall the apportionment to any State under this provision be in excess of 20 per centum of the total of funds affected thereby, and the total of the apportionments to each State during the six-year period beginning with the fiscal year 1942 shall equal the total of the apportionments that would have been made to each State during such period if the discretionary power conferred by this proviso had not been exercised.

* * *

DEPARTMENT OF AGRICULTURE APPROPRIATION ACT, 1944

CHAPTER 215 - PUBLIC LAW 129

(H. R. 2481)

An Act making appropriations for the Department

of Agriculture for the fiscal year ending June 30, 1944, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The following sums are appropriated, out of any money in the Treasury not otherwise appropriated, for the Department of Agriculture for the fiscal year ending June 30, 1944, namely:

* * *

FOREST SERVICE

Salaries and Expenses

* * *

National forest protection and management: For the administration, protection, use, maintenance, improvement, and development of the national forests, including the establishment and maintenance of forest tree nurseries, including the procurement of tree seed and nursery stock by purchase, production, or otherwise, seeding and tree planting and the care of plantations and young growth; the maintenance and operation of aerial fire control by contract or otherwise, with authority to renew any contract for such purpose annually, not more than twice, without additional advertising; the maintenance of roads and

trails and the construction and maintenance of all other improvements necessary for the proper and economical administration, protection, development, and use of the national forests, including experimental areas under Forest Service administration: *Provided,* That where, in the opinion of the Secretary, direct purchases will be more economical than construction, improvements may be purchased; the construction, equipment and maintenance of sanitary, fire preventive, and recreational facilities; control of destructive forest tree diseases and insects; timber cultural operations; development and application of fish and game management plans; propagation and transplanting of plants suitable for planting on semiarid portions of the national forests; estimating and appraising of timber and other resources and the development and application of plans for their effective management, sale, and use; acceptance of moneys from timber purchasers for deposit into the Treasury in the trust account Forest Service Cooperative Fund, which moneys are hereby appropriated and made available until expended for scaling services requested by purchasers in addition to those required by the Forest Service, and for refunds of amounts deposited in excess of the cost of such work; examination, classification, surveying, and appraisal of land incident to effecting exchanges authorized by law and of lands within the boundaries of the national

forests that may be opened to homestead settlement and entry under the Act of June 11, 1906, and the Act of August 10, 1912 (16 U. S. C. 506-509), as provided by the Act of March 4, 1913 (16 U. S. C. 512); and all expenses necessary for the use, maintenance, improvement, protection, and general administration of the national forests, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted under the Act of March 1, 1911 (16 U. S. C. 521), and the Act of June 7, 1924 (16 U. S. C. 471, 499, 505, 564-570), lands transferred by authority of the Secretary from the Resettlement Administration to the Forest Service, and lands transferred to the Forest Service under authority of the Bankhead-Jones Farm Tenant Act, $14,978,537: *Provided,* That this appropriation shall be available for the expenses of properly caring for the graves of persons who have lost their lives as a result of fighting fires while employed by the Forest Service: *Provided further,* That in sales of logs, ties, poles, posts, cordwood, pulpwood, and other forest products the amounts made available for schools and roads by the Act of May 23, 1908 (16 U. S. C. 500), and the Act of March 4, 1913 (16 U. S. C. 501), shall be based upon the stumpage value of the timber.

* * *

Acquisition of Lands for National Forests

For the acquisition of forest lands under the provisions of the Act approved March 1, 1911, as amended (16 U. S. C. 513-519, 521), $100,000, of which not to exceed $18,675 may be expended for personal services in the District of Columbia.

Total, Forest Service, $24,678,065.

* * *

FOREST ROADS AND TRAILS

For carrying out the provisions of Section 23 of the Federal Highway Act approved November 9, 1921 (23 U. S. C. 23), and for the construction, reconstruction, and maintenance of roads and trails on experimental areas under Forest Service administration, including not to exceed $59,500 for personal services in the District of Columbia, $2,537,168 for forest development roads and trails, representing the balance of the amount authorized to be appropriated therefor for the fiscal year 1943 by the Act of September 5, 1940 (54 Stat. 867), together with $1,241,555 from the unobligated balances of previous appropriations for forest highways which is hereby reappropriated for forest development roads and trails; in all, $3,778,723, to be immediately avail-

able and to remain available until expended: *Provided,* That this appropriation shall be available for the rental, purchase, or construction of buildings necessary for the storage and repair of equipment and supplies used for road and trail construction and maintenance, but the total cost of any such building purchased or constructed under this authorization shall not exceed $7,500.

* * *

RURAL POST ROADS — GOVERNMENT AID

CHAPTER 236 - PUBLIC LAW 146

(H. R. 2798)

An Act to amend the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended and supplemented, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

The definition of the term "construction" in Section 2 of the Federal Highway Act approved November 9, 1921 (42 Stat. 212), is hereby amended to read as follows: "The term 'construction' means

the supervising, inspecting, actual building, and all expenses, including the costs of rights-of-way, incidental to the construction of a highway, except locating, surveying, and mapping."

No. 11342

In the United States Circuit Court of Appeals for the Ninth Circuit

POLSON LOGGING COMPANY, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

DAVID L. BAZELON,
Assistant Attorney General.
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FILED
DEC - 4 1946
PAUL P. O'BRIEN

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court wrote no opinion.

JURISDICTION

This is a proceeding by the United States to condemn land situated in the Western District of Washington. The district court had jurisdiction under the General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C., sec. 257. Final judgment on the jury verdict was entered December 19, 1945 (R. 298). Notice of appeal was filed March 18, 1946 (R. 306). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code, as amended, 28 U. S. C., sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the Secretary of Agriculture was authorized to acquire lands for the purpose of a road giving access to the Olympic National Forest.

2. Whether in determining compensation payable upon the taking of lands for such a road, the court correctly excluded evidence of value based upon anticipated removal of timber from the National Forest over such road.

STATUTES INVOLVED

The relevant provisions of the statutes upon which the Government relies as authority for the taking are set out in the Argument as follows: The General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. sec. 257, at p. 12, *infra;* the Department of Agriculture Appropriation Act for the fiscal year ending June 30, 1942, Act of July 1, 1941, c. 267, 55 Stat. 408 at p. 15, *infra;* sections 2 and 23a of the Federal Highway Act of November 9, 1921, c. 119, 42 Stat. 212 as amended by the Act of July 13, 1943, c. 236, 57 Stat. 560 at pp. 22–23, *infra;* and the Department of Agriculture Appropriation Act for the fiscal year ending June 30, 1944, Act of July 12, 1943, c. 215, 57 Stat. 392, 415 at p. 24, *infra.*

STATEMENT

On January 21, 1942, the United States instituted these proceedings by filing in the court below a petition for condemnation of a permanent easement for highway purposes over certain lands in Grays Harbor County, Washington (R. 2–12). The petition stated

that the highway was to be used for the administration, protection, development and improvement of the Olympic National Forest, including the transportation of men, supplies and equipment needed for these purposes and of timber removed from the forest (R. 4–5; see also R. 10, 14, 16–17). The lands comprised a 100-foot strip, 11.6 miles in length, containing approximately 140.3 acres (R. 6). The petition declared that the Secretary of Agriculture was authorized to acquire these lands by the Act of June 4, 1897, c. 2, 30 Stat. 34, as amended, 16 U. S. C. secs. 473–482, 551, and the Act of July 1, 1941, c. 267, 55 Stat. 408, 422 (R. 4). At the same time, a declaration of taking was filed (R. 16–18) and the sum of $8,280.00, estimated just compensation, was deposited in the registry of the court (R. 21). And on January 23, 1942, the court entered judgment on the declaration of taking and ordered that possession of the property be delivered to the United States on or before the following February 2 (R. 22–27).

On February 21, 1942, appellant, one of the defendants named in the petition (R. 2–3) moved to vacate the judgment entered on the declaration of taking (R. 32–33) and, on March 30, it filed its demurrer to and motion to dismiss the petition in condemnation (R. 35–37). In each, it asserted that the statutes relied on did not authorize the Secretary of Agriculture to acquire the lands in question. Hearing on these motions was postponed (see R. 37–44) while the parties attempted—unsuccessfully—to negotiate a settlement (R. 143–144, 176–178).

On October 22, 1943, the United States filed an amended petition in condemnation (R. 47–59). It prayed for condemnation of additional lands, so that as a result the entire acreage sought was approximately 288 acres made up of a 100-foot strip 15.52 miles containing 187.63 acres and three tracts, No. 1 containing 1.01 acres (R. 51), No. 2 containing 10 acres (R. 54) and No. 3 containing 90 acres (R. 54). It sought a fee title instead of a permanent easement (R. 57). The uses to which the lands were to be put were in substance the same as those described in the original petition (R. 48–49). And, as in the original petition, the Act of June 4, 1897, c. 2, 30 Stat. 34, as amended, 16 U. S. C. secs. 473–482, 551, and the Act of July 1, 1941, c. 267, 55 Stat. 408, 422, were relied on as authorizing the acquisition. At the same time, a declaration of taking, which conformed to the amended petition, was filed (R. 60–63) and the sum of $688, estimated as the additional amount required for just compensation, was deposited in the registry of the court (R. 62).

On October 25, 1943, and the days following hearings were held upon appellant's motion to vacate the judgment entered on the first declaration of taking and its demurrer to and motion to dismiss the petition in condemnation. At the same time, the United States applied for entry of judgment on its second declaration of taking and appellant moved "to quash and adjudge null and void" the second declaration of taking (see R. 73, 75–76). On November 12, 1943, the court entered an order which recited that the court had "ruled that [appellant's] motions should be granted without prej-

udice to the [Government's] right to apply, on notice, for leave to file another or further Declaration of Taking and another or further amended petition in condemnation." The order declared (1) that the first declaration of taking was "unauthorized and insufficient to vest title in the United States of America to any of the lands and property therein described, and was and is of no effect"; (2) that the judgment entered on that declaration was "vacated, set aside and quashed"; (3) that the second declaration was likewise unauthorized and ineffective; (4) that the petition in condemnation and the amended petition were dismissed "but without prejudice to the filing of a new or amended petition herein"; and (5) that, "notwithstanding the foregoing rulings, this cause shall be considered to be pending," and the deposits of $8,968.00 should be retained in court (R. 75–79). The Government excepted to the order (R. 78; and see R. 207).

On the day the foregoing order was made, i. e., on November 12, 1943, the United States filed a third declaration of taking (R. 82–85). It took a fee to the lands described in the second declaration (R. 84, 85), and declared that estimated just compensation was the sum of $8,968.00, previously deposited in the court (R. 85). As authority for the acquisition, it relied, not only on the Acts of June 4, 1897, as amended, and July 1, 1941 (cited in the previous declarations), but also the Act of November 9, 1921, c. 119, 42 Stat. 212, 218, 23 U. S. C. secs. 1–25, the Act of September 5, 1940, c. 715, 54 Stat. 867; the Act of July 12, 1943,

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c. 215, 57 Stat. 392, 415, the Act of July 13, 1943, c. 236, 57 Stat. 560, and supplementary and amendatory statutes (R. 82).[1] Thereafter, on May 1, 1944, the United States filed its Second Amended Petition in Condemnation (R. 92–97) which conformed to the declaration of taking filed on November 12, 1943. Appellant on November 24, 1943, had moved to quash this declaration of taking on the ground that it failed to show statutory authority to acquire (R. 86–88). The United States now moved for entry of judgment thereon (R. 98). On May 23, 1944, after extended argument (R. 184–226) the court entered an order which (1) granted the Government's motion for judgment on the third declaration of taking, (2) granted leave to file the second amended petition in condemnation, (3) denied appellant's motion to quash that declaration and (4) on its own motion modified its order of November 12, 1943, "by vacating and setting aside any and all parts of said order which may be interpreted as denying the authority of the Secretary of Agriculture to condemn land in the manner and for the purposes set forth in the original and amended petitions in condemnation on file herein at the time of the entry of said order" (R. 99–101). Pursuant to that order, the court at the same time entered judgment on the third declaration of taking (R. 108–113). The judgment recited that the United States was entitled to acquire the property under all the statutes

[1] On October 29, 1943, during the argument which resulted in the order of November 12, 1943, the Government "presented" a Second Amended Petition in Condemnation (R. 134). It seems not to have been filed and is not in the record. It was "withdrawn" thereafter (R. 164).

recited in the declaration (R. 109). It adjudged that the possession taken pursuant to the first declaration of taking was confirmed as of the date it was taken and granted immediate possession of the remainder of the property (R. 112). Appellant's appeal from the judgment (R. 117) was dismissed by this Court on the ground it was not final (R. 236–237) *Polson Logging Co.* v. *United States,* 149 F. 2d 877.[2]

By an order entered September 24, 1945, the court ruled that value should be determined as of October 22, 1943, excluding the value of improvements made by the Government between February 5, 1942, and October 22, 1943 (R. 253). And at the commencement of the trial on November 12, 1945, the court ruled that the burden of proof was upon the Government (R. 335–336). The facts and evidence as they appeared at the trial may be summarized as follows:

The property in suit consists of a system of logging roads in the Humptulips River basin, Grays Harbor County, Washington, extending from the Olympic Peninsula Highway (U. S. 101) in the eastern part of Township 21 North, Range 10 West, Willamette Meridian, northeasterly across Township 21 North, Range 9 West, to the Olympic National Forest (R. 63). The bulk of the surrounding land is owned by appellant (R. 620–621), who logged it between 1918 and 1939 except for about 400 acres of timber of sorts that would not have been profitable to log at that time

[2] Subsequently appellant reiterated its claim that the taking was not authorized by moving to quash the declaration of taking and to vacate the judgment entered thereon (R. 250) and by its answer (R. 259).

(R. 489, 520–521). That logged-over land is now held by appellant as part of an 84,000 acre "tree farm" or reforestation area (R. 621, 642). Much of the present road system was originally constructed by appellant as a logging railroad (R. 356, 585–588) beginning about 1916 (R. 613). The rails and ties were removed about 1939, when appellant had completed profitable logging of the surrounding area (R. 613).

A Mr. A. M. Abel, who owned a half-section of timber in the Olympic National Forest, made an arrangement with appellant in February 1939, by which he was allowed to convert the abandoned railroad bed into a truck road and log his timber over it at a charge of fifty cents per thousand board feet of timber hauled (R. 468–470). In the following April he assigned that contract to the M. & D. Timber Company, and under it logging was completed not only of Mr. Abel's land but also of most of the privately owned timber in the Humptulips River basin, which the M. & D. Company bought for that purpose (R. 468–470). The M. & D. Company then began to buy timber in the Olympic Forest, but appellant secured an injunction against removal of that timber over the roads (R. 475, 481–482), apparently on the ground that it was not within the terms of the contract with A. M. Abel. The M. & D. Company thereupon began a suit to condemn the right-of-way, but when the present suit was begun by the United States, the company discontinued its action and instead used the road under a license from the United States. It continued that use until November 1943 when the district court set aside its

judgment on the declaration of taking in this case (R. 479). Appellant has since filed suit against the M. & D. Company for $28,000.00 damages for its hauling of logs under its license from the United States (R. 479, 482).

The road was impassable when the M. & D. Company began work on it in 1939 (R. 453). Appellant has spent no money on it since then (R. 483); the M. & D. Company spent $12,000.00 or $15,000.00 to deck the bridges and put the road in shape (R. 454, 483), and an additional $1,500.00 or more to repair the bridges after receiving its license from the United States in 1942 (R. 476). Several of the bridges were in very bad condition in 1942, and the United States has spent $38,178.00 on repair or replacement of bridges and improvements of the road (R. 370). Completion of the contemplated improvements will cost a further $49,340.00 (R. 370).

The Government presented four expert appraisers who took the view that the best use of the land taken was for reforestation and a trail for fire prevention and that for such uses the value was $1.00 to $1.50 per acre or $273.96 to $410.94 (R. 437–439, 493–495, 518, 535, 536). Appellant took the position that the best of the property taken was as a logging road. Evidence based upon a prospect of such use to remove timber from the national forest on the theory that, while other routes could be used for removal of the national forest timber, this road was the best route therefor was excluded (see e. g. R. 751–752). However, evidence was admitted as to tolls appellant had received from use of the road (R. 637–638). In addition, Blair McGilli-

cudy, a witness for appellant, estimated cost of reproduction less depreciation to be $194,014.38 (R. 690).[3] However, he testified he would not advise purchase of the road at anywhere near that amount if the purchaser owned less than five million feet of timber immediately adjacent to the road (R. 717). Another witness for appellant estimated value of the road, excluding consideration of any timber in the national forest, to be $200,000.00 (R. 729–730, 734, 742).

The court instructed the jury that it should value the land by taking into consideration all of the uses for which the property is reasonably suitable (R. 761); that it was for the jury to determine whether the highest and best use was for growing timber as the Government contended (R. 763); and that special value to the Government should not be considered (R. 764, 767–768). The jury returned a verdict for $6,500.00 (R. 289). After appellant's motion for new trial was denied (R. 297), judgment was entered on December 19, 1945 (R. 298) and this appeal followed (R. 306).

ARGUMENT

I

The condemnation proceedings were properly authorized by Congress

The second amended petition in condemnation describes the purpose of the proceeding as follows (R. 93–94):

[3] His opinion of value of the road (R. 695) was later stricken (R. 698, 703) insofar as it rested on the possibility of hauling timber out of the national forest, but the court denied the Government's motion to strike his estimate of cost of reproduction (R. 705).

* * * to provide for the construction, maintenance, and use of a highway, logging railroad, logging road, skidway, and landing ground purposes, and for ingress and egress, to Olympic National Forest over which to remove the dead, mature, and large growth of trees, timber products, and other products upon and from said Forest, especially Sitka spruce being used in connection with the manufacture of airplanes by the Government and our allies, and transportation of said timber, timber products, and other products, and persons and material, to practical points for the manufacture and marketing of said timber and timber products, and in the administration, conservation, preservation and protection of said Forest, and prevention and extinguishment of fires therein, or adjacent thereto, and for use as a permanent highway for all said purposes, and for the use of the people of the United States generally for all lawful and proper purposes, having regard to the geographical, topographical and other conditions of said Forest, and lands in the vicinity thereof, which affect the welfare, safety and preservation of the Forest. Said lands are declared necessary for all of said purposes, and for all such other purposes and uses, including the use of the people of the United States visiting said Forest for business, health, recreation and enjoyment, as are, or may be, authorized by Congress, or by Executive Order, or by the Department of Agriculture, not inconsistent with the administration of said Olympic National Forest, and all thereof are required for immediate use by the United States of America, and such selection, designa-

tion and determination ever since have been and now are in full force and effect.

(See also R. 4, 14, 16, 45, 48, 60–61, 80, 83).

Appellant does not, and cannot, deny that the taking of land for these purposes is a taking for public use. Thus, no issue as to constitutional power is presented here but simply a question of authority of the Secretary of Agriculture to acquire land for a proper purpose. Moreover, appellant recognizes (Br. 50–51) that the Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. sec. 257 authorizes condemnation "in every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses." This authorization to procure real estate may be manifested by the making of an appropriation for such purpose as well as by a specific authorization to acquire. *United States* v. *North American Co.,* 253 U. S. 330, 333 (1920); *Hanson Co.* v. *United States,* 261 U. S. 581, 587 (1923); *United States* v. *Threlkeld,* 72 F. 2d 464 (C. C. A. 10, 1934), certiorari denied 293 U. S. 620 (1934); *United States* v. *Dieckmann,* 101 F. 2d 421, 424 (C. C. A. 7, 1939). The sole question in the instant case is, therefore, whether Congress authorized the Secretary of Agriculture to purchase lands for this purpose. Although estimated compensation of $8,968.00—which is more than adequate to pay the award of $6,500.00 (R. 299)—has been deposited in court, appellant asserts (Br. 56) that "there is no appropriation to pay for these lands." For reasons

to be given, we submit that, on the contrary, the Secretary of Agriculture was authorized to purchase these lands.

A. *Acquisition of this property was authorized under the Acts of June 4, 1897, and July 1, 1941.*—By the Act of June 4, 1897, c. 2, 30 Stat. 34 as amended, 16 U. S. C. secs. 473–482, 551, the Secretary of Agriculture is charged with the general administration of national forests. In *United States* v. *Threlkeld,* 72 F. 2d 464 (C. C. A. 10, 1934), certiorari denied 293 U. S. 620 (1934) the court sustained the authority of the Secretary of Agriculture to acquire privately owned lands for the purpose of use for a logging highway in connection with a national forest. The court there pointed out that it was the general policy of Congress to protect, develop and utilize the resources of the national forests and that for such purpose facilities for the transportation of persons and property are an "imperative necessity." The court said (pp. 465–466):

> * * * Realizing that necessity, Congress made a substantial appropriation for the construction and maintenance of roads, trails, bridges, fire lanes, telephone lines, cabins, fences, and other improvements necessary for the proper and economical administration, protection, and development of the forests during the fiscal year ended June 30, 1934. Act of March 3, 1933, 47 Stat. 1432, 1449. Similar appropriations have been made annually for many years. The language used is broad, and vests wide discretion in the Secretary of Agriculture

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to determine the kind, character, and location of the roads; also the nature, extent, and location of the other improvements requisite to the desired husbandry of the forests. It should be noted that the act does not provide that such roads or other improvements must be exclusively within the forests. Congress must have borne in mind that, due to geographic, topographic, and other conditions too numerous to detail, it might be expedient and advantageous to construct approach or entrance roads at strategic points or crossing privately owned land in order to provide a feasible and necessary system of egress, ingress, and transportation of persons and material. It must be presumed that Congress likewise realized that for similar reasons it might be necessary to provide tramways, logging railroads, skidways, and landing grounds on privately owned land situated within or adjacent to forests for the transportation, handling, and marketing of timber and minerals. Location, geography, topography, and industrial conditions could render it impossible to achieve these results otherwise. *It is difficult to believe that Congress intended to vest the administration of such vast and valuable estates in the Secretary of Agriculture to be preserved and utilized in the public interest without empowering him to acquire privately owned land for those essential purposes.* * * * [Italics supplied.]

The *Threlkeld* case referred to the appropriation act for the fiscal year ending June 30, 1934. Subsequently the form of Agriculture Department Appropriation Acts was changed so that the Act of July 1,

1941, c. 267, 55 Stat. 408, which is the Department of Agriculture Appropriation Act for the fiscal year ending June 30, 1942, under the subheading "Forest Service" appropriated funds:

> National forest protection and management: For the administration, protection, use, maintenance, improvement, and development of the national forests, including the establishment and maintenance of forest tree nurseries, including the procurement of tree seed and nursery stock by purchase, production, or otherwise, seeding and tree planting and the care of plantations and young growth; the maintenance and operation of aerial fire control by contract or otherwise; the maintenance of roads and trails and the construction and maintenance of all other improvements necessary for the proper and economical administration, protection, development, and use of the national forests, including experimental areas under Forest Service administration; * * *; and all expenses necessary for the use, maintenance, improvement, protection, and general administration of the national forests, including lands under contract for purchase or for the acquisition of which condemnation proceedings have been instituted under the Act of March 1, 1911 (16 U. S. C. 521), and the Act of June 7, 1924 (16 U. S. C. 471, 499, 505, 564–570), lands transferred by authority of the Secretary of Agriculture from the Resettlement Administration to the Forest Service, and lands transferred to the Forest Service under authority of the Bankhead-Jones Farm Tenant Act, $11,050,411, * * *.

Appellant relies (Br. 58–60) on the fact that the word construction is not used in the reference to road and trails in the 1941 Act and argues that thereby Congress intended to deprive the Secretary of Agriculture of authority to acquire lands for roads. But this argument ignores the further provision of the same section which includes "all expenses necessary for the use, maintenance, improvement, protection and general administration of the national forests". Clearly, as the court reasoned in the *Threlkeld* case, the grant of these general powers of administration and of authority to spend funds for such purposes empowered the Secretary to acquire privately owned land for these essential purposes. Cf. *United States ex rel. T. V. A.* v. *Welch,* 90 L. Ed. Adv. Op. (1946). Moreover, the legislative materials make it clear that in changing the language Congress had no intention of denying the power to construct roads.

The Appropriation Act for the Department of Agriculture for the fiscal year ending June 30, 1935, Act of March 26, 1934, c. 89, 48 Stat. 467, 482, omitted the appropriation for improvement of national forests which, as pointed out in the *Threlkeld* case (*supra*) had been made for many years. The Appropriations Committee of the House stated, "These eliminations have been compensated for by allotments from Public Works and other emergency funds" H. Rep. No. 820, 73rd Cong. 2d Sess., pp. 10–11. In the following year, by the Act of May 17, 1935, c. 131, 49 Stat. 247, 262, funds for these various items were again included in the Agriculture Department Appro-

priation. In so doing the language of the appropriation for the Forest Service was completely revised as compared to the form of the 1933 and earlier acts. In this process of rewriting the word "construction" was omitted when referring to roads and trails. The House Committee stated with reference to the appropriations for the Forest Service in the 1935 Act, "The Budget increase contemplates the discontinuance of the emergency funds under this item and the restoration of the regular appropriation." H. Rep. No. 385, 74th Cong. 1st sess., p. 8. There is nothing to indicate that the change of language was intended to curtail the operations of the Secretary of Agriculture and to deny him any authority to open new roads and trails.

Since 1935 the language of the Forest Service appropriation has remained substantially the same.[4] During this time, the Forest Service exercised the same powers to construct necessary roads, trails and bridges as it did in earlier years and Congress was informed of these actions. Thus, in the Annual Report of the Secretary of Agriculture for 1936 it was stated (p. 114) "Also completed were improvements on 22 miles of flood-damaged highways, on 236 miles of forest highways, and on 436 miles of highways through other public lands built by the Bureau of Public Roads, and 5,684 miles of forest roads and

[4] Act of June 4, 1936, c. 489, 49 Stat. 1421, 1437; Act of June 29, 1937, c. 404, 50 Stat. 359, 411; Act of June 16, 1938, c. 464, 52 Stat. 710, 726; Act of June 30, 1939, c. 253, 53 Stat. 939, 955; Act of June 25, 1940, c. 421, 54 Stat. 532, 546; Act of July 1, 1941, c. 267, 55 Stat. 408, 422; Act of July 22, 1942, c. 516, 56 Stat. 664; 680.

1,965 miles of trails built by the Forest Service."[5] It was further stated that the current program included 716 miles of forest highways. The 1937 Annual Report stated (p. 113) "Also, the construction of 139 miles of forest highways supervised by the Bureau of Public Roads, of 3,328 miles of forest development roads, of 1,540 miles of forest trails, and of 115 miles of minor forest highways handled by the Forest Service was completed." It further stated, in discussing the current program, "In addition many miles of forest roads and trails are being constructed and improved by the Forest Service." In the 1938 Annual Report, it is said (p. 157) "The roads built in the national forests and parks, in the Indian reservations, and on western public lands, are essential to the development and care of Federal reservations." In the 1943 Annual Report it was stated (p. 180):

> At the request of the Public Roads Administration and the War Production Board, the Forest Service undertook 103 construction projects during the year involving 1,200 miles of road to make accessible timber and minerals needed for war purposes. Thirty-eight of these access roads were to open up timber areas; 65 were to facilitate the operation of mines. Meanwhile only a minimum of maintenance has been done to keep in serviceable condition the existing roads and trails required for protection and administration of the national forests. Considerable construction, im-

[5] For the convenience of the court, more complete excerpts from these annual reports are set out in the appendix, *infra*, pp. 38–43.

> provement, and maintenance work will therefore be necessary after the war to bring the road and trail system to a satisfactory standard.

Thus, in the period of several years since the change of language in 1935, the Forest Service has exercised the same broad powers to construct roads that it exercised prior to that date. The annual reports were, of course, submitted to Congress which was thereby advised of the administrative practice and it continued to make the appropriations every year in the same language. In *Brooks* v. *Dewar,* 313 U. S. 354 (1941) with reference to a similar situation, the court said (p. 361):

> The repeated appropriations of the proceeds of the fees thus covered, and to be covered, into the Treasury, not only confirms the departmental construction of the statute, but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the Act.

Since the sole question here is whether Congress has authorized the Secretary of Agriculture to construct roads giving access to national forests (*supra,* p. 12), the Congressional ratification of the administrative view that such power did exist is, we submit, conclusive. This result is confirmed by the fact that, as stated in the *Threlkeld* case (*supra*) and by the Secretary in his Annual Report for 1938 (*supra*), the construction of roads is an "imperative necessity" for proper development and utilization of the resources of the national forests. Knowing this fact, Congress did not, at any time, deny the existence of

the authority. As the court below said, the statute "certainly confers upon the petitioner herein not only the right but the duty to see that, if it be essential, a way of ingress and egress is provided so that the products of this great National asset may be utilized by the Nation, as a whole, and by the people directly interested in the lumbering activity" (R. 211; see also R. 222). Thus, we submit that the construction of roads was "necessary for the use, maintenance, improvement, protection, and general administration of the national forests" and that, since Congress has ratified the administrative construction to that effect, appellant's claim that such power does not exist is plainly erroneous.

B. *The United States has not waived its right to rely upon the 1897 and 1941 Acts.*—Relying upon the rulings of the court below prior to its orders of May 23, 1944, which sustained the Government's authority to condemn (R. 91, 99–101, 108–113), appellant argues that the Government cannot now rely upon the 1897 and 1941 Acts. This contention takes various forms. It is said (Br. 53, 62) that the court's order of November 12, 1943 (R. 75) became the law of the case; that such order became final and that the court lacked jurisdiction to set it aside as provided in its order of May 23, 1944 (Br. 73–80, R. 100–101). These arguments are founded upon the erroneous notion that the order of November 12, 1943, was final and appealable (Br. 75).

The order of November 12, 1943, declared that the two declarations of taking were not authorized (R. 77), vacated the judgment on declaration of taking

entered January 23, 1942 (R. 77), and dismissed the petition "but without prejudice to the filing of a new or amended petition herein" (R. 78). These provisions would seem to indicate that a final judgment of dismissal had been entered. But the order further provided "that notwithstanding the foregoing rulings and orders, this cause shall be considered to be pending and the $8,280.00" deposited with the first declaration of taking "and the $688.00" deposited with the second declaration of taking "shall be retained and held by the Clerk of the Court pending further order of this court" (R. 78). Thus, rather than dismissing the proceeding, the order specifically held it pending and retained the amount deposited. "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States,* 324 U. S. 229, 233 (1945). Here the court has simply sustained a motion to dismiss or a demurrer while specifically refusing to dismiss the action. Such an order is not final and appealable. *Tee-Hit-Ton Tribe of Tlingit Indians of Alaska* v. *Olson,* 144 F. 2d 347 (C. C. A. 9, 1944); *Wright* v. *Gibson,* 128 F. 2d 865, 866 (C. C. A. 9, 1942); 10 *Cyclopedia of Federal Procedure* (2d ed. 1943), sec. 4901, p. 288, n. 66. Since the order was merely interlocutory and not final, the court had jurisdiction at a subsequent term to set it aside. 8 *Cyclopedia of Federal Procedure* (2d ed. 1943), sec. 3597, pp. 341–342. Moreover, even if the proceeding had been dismissed, it would have been without prejudice (R. 78) and hence would not have been *res judicata* of the Government's claim.

It is clear that there was no waiver of the Government's right to rely upon the statutes cited in the first and second declarations of taking and the original petition in condemnation. Exceptions were allowed to the Government from the order of November 12, 1943 (R. 78) and those statutes were again relied upon in the second amended petition in condemnation filed May 23, 1944 (R. 92–97). Nothing further could have been done to protect the Government's rights. Cf. *United States* v. *0.44 of An Acre of Land, etc.,* 156 F. 2d 650, 653 (C. C. A. 3, 1946). It is plain, therefore, the Government is entitled to rely upon the 1897 and 1941 Acts as authority for the condemnation in the instant case.

C. *In any event acquisition of this property was authorized by the Federal Highway Act as amended by the Act of July 13, 1943, c. 236, 57 Stat. 560.*—The Federal Highway Act of November 9, 1921, c. 119, 42 Stat. 212, 218, 23 U. S. C., secs. 1–25, provided for administration of highway matters by the Secretary of Agriculture. Section 23 (a) of the Federal Highway Act, 23 U. S. C. sec. 23 (a) provides:

> Fifty per centum, but not to exceed $3,000,000 for any one fiscal year, of the appropriation made or that may hereafter be made for the survey, construction, reconstruction, and maintenance of forest roads and trails shall be expended under the direct supervision of the Secretary of Agriculture in the survey, construction, reconstruction, and maintenance of roads and trails of primary importance for the protection, administration, and utilization of the national

> forests, or when necessary, for the use and development of the resources upon which communities within or adjacent to the national forests are dependent, and shall be apportioned among the several States, Alaska, and Puerto Rico by the Secretary of Agriculture, according to the relative needs of the various national forests, taking into consideration the existing transportation facilities, value of timber, or other resources served, relative fire danger, and comparative difficulties of road and trail construction.[6]

However, this provision as it existed until 1943 would not support the condemnation in the instant case because section 2 of the Act (23 U. S. C. sec. 2) originally provided that "The term 'construction' means the supervising, inspecting, actual building, and all expenses incidental to the construction of a highway except locating, surveying, mapping, and costs of rights of way." The situation was changed, however, by the Act of July 13, 1943, c. 236, 57 Stat. 560, which provided:

> That the definition of the term construction in section 2 of the Federal Highway Act approved November 9, 1921 (42 Stat. 212), is hereby amended to read as follows: "The term 'construction' means the surveying, inspecting, actual building, and all expenses, including the costs of rights-of-way incidental to the construction of a highway, except locating, surveying and mapping.

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[6] "The term 'forest roads' means roads wholly or partly within or adjacent to and serving the national forests." Section 2 of Federal Highway Act, 23 U. S. C., sec. 2.

Thus, the Secretary of Agriculture is authorized to construct roads giving access to national forests including, after the 1943 amendment, the providing of the necessary right of way. Being so authorized, he was empowered to acquire the necessary lands by condemnation (*supra,* p. 12). The Department of Agriculture Appropriation Act which was signed July 12, 1943, provided funds "For carrying out the provisions of Section 23 of the Federal Highway Act approved November 9, 1921 (23 U. S. C. 23)" [7] 57 Stat. 392, 415. The amendment to the Federal Highway Act was approved by the President one day later, on July 13, 1943. Relying upon this one-day difference, appellant argues (Br. 67–69) that the Appropriation Act did not embrace the broader purposes of the amended Highway Act. But this is not a case of one statute adopting the substantive provisions of other existing legislation. The Appropriation Act simply made funds available for the fiscal year ending June 30, 1944. The two acts are in *pari materia* since they deal with the same subject matter Since they were enacted at the same session of Congress "they are to be taken together as one law." *Wells* v. *Supervisors,* 102 U. S. 625, 632 (1880); *United States* v. *Stewart,* 311 U. S. 60, 64 (1940); 2 Sutherland, *Statutory Construction* (3rd ed. 1943), sec. 5202, pp. 537–539. Thus, it is the rule generally that statutes passed by the same session of a state legislature are to be construed together. *Dial* v. *Chatan,* 70 F. 2d 21 (C. C. A. 4, 1934); *State* v. *McBride,* 33 Idaho 124, 190 Pac. 247 (1920); *Shouse*

[7] Similar appropriations had been made in the various appropriation acts. See acts listed in footnote, *supra,* p. 17.

v. *Board of County Commissioners,* 151 Kan. 458, 99 P. 2d 779 (1940); *Donoghue* v. *Bunkley,* 25 So. 2d 61 (Ala. 1946). This rule is of special significance when applied to federal appropriation acts which make funds available for the entire fiscal year. Congress obviously intends that the funds shall be available for whatever function the Department is authorized to perform during the year. To adopt appellant's view would mean that the authority of a government department or agency could not be enlarged after the fiscal year had commenced without also enacting another appropriation bill. The rule referred to by appellant is simply one of the canons of construction which are applicable only insofar as they reflect the intent of the legislature. 2 Sutherland, *Statutory Construction* (3rd ed. 1943), secs. 4501, 5207–5209, pp. 314–316, 547–551. It is absurd to suppose that Congress intended that during 1943–1944 the funds appropriated could not be used for the purposes set out in the amended Highway Act; hence the rule relied upon by appellant is inapplicable here.

Thus, if it be assumed that the Secretary of Agriculture was not authorized to acquire land for purpose of an access road to the national forest prior to July 13, 1943, the amendment of the Federal Highway Act on that date granted such authority. The Act related back so as to validate the earlier taking of possession for that purpose. *Crozier* v. *Krupp,* 224 U. S. 290 (1912); *Shoshone Tribe* v. *United States,* 299 U. S. 476, 494–496 (1937). The court below, therefore,

acted correctly in confirming the previous taking of possession (R. 112), after the second amended petition was filed. Appellant's attack upon this ruling (Br. 73–80) is based upon the assumption that the earlier judgment was *res judicata*. Thus, referring to the Declaration of Taking Act, appellant asserts that the court could not require it to surrender possession prior to November 12, 1943 (Br. 78–79). But the first declaration of taking was filed January 21, 1942 (R. 16–18) and the second on October 22, 1943 (R. 60–63). Since, as we have shown (*supra,* pp. 20–22) the United States is not estopped to rely upon the earlier proceedings, the assertion lacks merit.[8] Moreover, the Declaration of Taking Act simply establishes a procedure ancillary to the main suit which may be invoked by the Government if it so desires. *Catlin* v. *United States,* 324 U. S. 229, 240 (1945). It is not the exclusive means by which possession may be obtained in advance of final judgment. The court may order the surrender of possession in the absence of statute providing therefor. *Commercial Station Post Office* v. *United States,* 48 F. 2d 183, 185 (C. C. A. 8, 1931). Thus, the court was authorized to confirm the prior possession.

In this connection, appellant complains (Br. 79) of the ruling of the district court that value should be determined on October 22, 1943, the date of filing the second declaration of taking. It argues that there was no effective taking until November 12, 1943. But

[8] The amendment made on September 18, 1945, to which appellant refers (Br. 77) was made merely to correct an inadvertent omission of one course in the description (R. 246–247).

in *11,000 Acres of Land, Etc.,* v. *United States,* 152 F. 2d 566 (C. C. A. 5, 1945), certiorari denied April 29, 1946, the court said:

> We regard it as well settled that, either where no declaration of taking is filed or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired.[9]

It would, therefore, have been plain error to determine value as of November 12, 1943, as appellant asks. Moreover, no attempt is made to show that value of the property had changed nor is reference made to any other fact indicating that appellant was prejudiced by this alleged error.

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[9] Taking this view, the Government contended in the court below that the date of valuation was February 5, 1942, when possession was taken (R. 254). The court below, however, ruled that the proper date was October 22, 1943, but the value of any improvements placed upon the property by the Government in the meantime should be disregarded. The record shows that no such improvements were made (R. 174, 564) and appellant makes no mention of this portion of the ruling. The court below apparently selected the October date because at that time the Government changed the estate sought to be condemned from an easement to a fee title (R. 57). This change made little practical difference and was done in order to avoid any question as to the right to dismantle and reconstruct bridges (R. 176). It is not believed that this change affected the proper date of valuation. Cf. *Bank of Edenton* v. *United States*, 152 F. 2d 251 (C. C. A. 4, 1945). However, since the difference in dates made no difference in value (R. 568–569, 572, 573, 574) and the October amendment introduced additional parcels (R. 54), the Government has made no complaint of this ruling.

D. *The condemnation of lands to supply gravel for the road was authorized.*—By the amended petition of October 22, 1943 and the amended declaration of taking filed that date, the Government included in the land taken Tract No. 2 containing 10 acres (R. 54) and Tract No. 3 containing 90 acres (R. 54). These tracts were taken for use as a source of gravel for improvement of the roads to be built or maintained on the other lands taken (R. 225–226, 507, 567–568). Since the Agriculture Department was authorized to build and maintain this road, it was obviously empowered to obtain the necessary material for that purpose. This is an essential part of maintenance of the road and is necessary "for the use, maintenance, improvement, protection and general administration" of the national forest. The furnishing of materials is an incident to building and maintaining the road just as it is an incident to construction of an airport (*Cameron Development Co.* v. *United States,* 145 F. 2d 209 (C. C. A. 5, 1944)) or of a dam (*United States* v. *Rayno,* 136 F. 2d 376 (C. C. A. 1, 1943); cf. *United States ex rel. T. V. A.* v. *Welch,* 90 L. Ed. Adv. Op. (1946)). Rather than restricting the authority of the Secretary of Agriculture, the statutes gave broad authority to the Secretary so that he could accomplish the stated purpose.

Appellant contends (Br. 72) that this is simply an attempt to enlarge the boundaries of the national forest. This argument is based on the assertion the lands were only useful for growing trees. The testimony was that the lands were valuable in private

ownership for this purpose (R. 506). They had no market value for gravel purposes since almost all lands in the vicinity contained gravel (R. 507). Cf. *Cameron Development Co.* v. *United States,* 145 F. 2d 209 (C. C. A. 5, 1944). Thus, the inference appellant draws is contrary to the evidence. While appellant says (Br. 73) that "the Government offered no testimony that these lands are gravel-bearing", the Government witness stated that the tracts did contain gravel and that "there is some right along the road, you can see it, sir" (R. 507).

II

The trial court's rulings on the issue of compensation were correct

Appellant complains of various rulings excluding evidence offered by it during the trial. All these rulings related to appellant's theory that the highest and best use of the property taken was for logging-road purposes for the removal of timber from the national forest (Br. 95).[10] The exclusion of this consideration was, we submit, correct for two reasons.

A. *The needs of the Government could not be considered in determining value.*—Appellant complains (Br. 94) of the court's instruction to the jury that

[10] Appellant makes no claim here that there was sufficient timber in the area owned by private persons other than appellant so as to give these lands value as a logging road. The witnesses recognized that practically all such timber had already been logged (R. 469, 472–473, 520, 695–696, 699) and, as the district court ruled, it was speculative whether appellant could collect tolls upon the removal of timber owned by others (R. 553, 729).

"Potential uses of this property cannot be considered by you insofar as they apply to or depend upon any uses to which the Government itself may put the property after having acquired it" (R. 763). The court's instructions made it clear that it was simply special value to the Government that should be excluded. The court charged (R. 767):

> You should not consider the need, if any, of the government for the property taken, nor the value of such property to the government upon its acquisition. However, if you find that this property here has a special utility or availability value not only to the government, but to others, then such utility or availability value should be considered by you in connection with what you find a purchaser would pay for the property.

In *United States* v. *Miller,* 317 U. S. 369 (1943) the court said (p. 375):

> Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus, although the market value of the property is to be fixed with due consideration of all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of value.

The only difference in substance between appellant's requested instructions No. 3, No. 8 and No. 13, which were refused (Br. 13–16) and the instructions actually given (R. 761–768) was that the latter directed the jury to exclude special value to the taker.

Clearly, refusal so to direct would have been plain error and appellant's objections to the charge given (Br. 16–20) and to the refusal to give the requested instructions (Br. 13–16) lack merit.

For the same reason, appellant's objections to rulings excluding evidence (Br. 20–27, 28–48) were correctly overruled. In *United States* v. *Rayno,* 136 F. 2d 376 (C. C. A. 1, 1943) where the Government condemned land to provide material required for a dam the court held that the Government's need for the material must be disregarded in determining compensation. Similarly in *Cameron Development Co.* v. *United States,* 145 F. 2d 209 (C. C. A. 5, 1944) the court sustained the exclusion of evidence of value of shell marl which the Government used in constructing airport runways, there being no showing that it had commercial value to others. As the court said in *United States* v. *Foster,* 131 F. 2d 3, 6 (C. C. A. 8, 1942), certiorari denied 318 U. S. 767 (1943), "The necessities of the public cannot be taken into consideration in fixing the value of property taken." See also *Olson* v. *United States,* 292 U. S. 246, 256, 261 (1934); *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 61 (1915).

There is no substance to appellant's disclaimer (Br. 80) of an attempt to recover the peculiar value to the Government of the property. Thus, this is not a case where appellant's property has been enhanced for general purposes because it adjoins Government property. The entire basis for the claim is that the road has special value because it would be used for

transporting the Government timber. This is precisely the same as the claim for "strategic value" which was rejected in *United States* v. *Chandler-Dunbar Co.,* 229 U. S. 53, 80–81 (1913) where the court said:

> A "strategic" value might be realized by a price fixed by the necessities of one person buying from another, free to sell or refuse as the price suited. But in a condemnation proceeding the value of the property to the Government for its particular use is not a criterion.

Thus, appellant here is not entitled to rely upon the alleged probability that arrangements would be made with the Government whereby its timber would be removed over this road. Cf. *United States ex rel. T. V. A.* v. *Powelson,* 319 U. S. 266 (1943). "The owners ought not to gain by speculating on probable increase in value due to the Government's activities." *United States* v. *Miller,* 317 U. S. 369, 377 (1943). But that is precisely what appellant seeks to do here since its entire claim rests upon the prospect that the timber "would be sold to private loggers, and that in ordinary experience and probability, that timber would be removed to market over the road that is under condemnation" (R. 700–701). In other words, that arrangements would be made with the Government whereby its timber would be removed over this road.

It is clear that if the United States cut and removed the timber itself, appellant's claim would represent an attempt to base value solely on the needs of the Government. Certainly no different result follows if it is assumed, as does appellant, that the

Government would accomplish the same result by selling its timber to private loggers who would remove it. In either event, the claim is based solely on the Government's need to dispose of timber in the Olympic National Forest.

B. *Appellant's proffered evidence was properly rejected because it was based upon speculation.*—It is well settled that "Value cannot be placed upon a remote possibility." *Mayor and City Council of Baltimore* v. *United States,* 147 F. 2d 786, 788 (C. C. A. 4, 1945); *People of Puerto Rico* v. *United States,* 132 F. 2d 220 (C. C. A. 1, 1942), certiorari denied 319 U. S. 752 (1943). As the court said in *Olson* v. *United States,* 292 U. S. 246, 257 (1934):

> Elements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.

It is, of course, true that the road was physically adaptable for use as a logging road. But whether the demand for such use was sufficient to create a market value for that purpose is an entirely different question. Clearly, the combination of occurrences by which appellant sought to establish a probability of such use, while possible, are not shown to be reasonably probable.

In the first place, it is assumed that timber will be cut in the national forest at the rate of twenty million feet a year (R. 701–702). The entire process fails if this assumption is erroneous or even if it substantially overestimates the volume of timber to be removed. Appellant asserts (Br. 97) that error was committed in refusing evidence offered to show that it was reasonably probable that the road taken would be used for the purpose of removing timber from the national forest. But whether such timber would be cut would depend upon future governmental policy. The nearest approach to an offer of facts, rather than the mere opinion of witnesses, was the attempt to show that officials of the Forest Service had stated a policy and intention to cut 20,000,000 feet a year (R. 748–753). But such statements obviously could not commit the Government, whose future program would depend upon the conservation policies applied to national forests. As the court below said (R. 543): "I do hold specifically that he is not entitled to have the jury consider what he might have been able to collect in tolls as the years went by and the Government sold its timber. One reason that I thus hold is that it is a speculative matter. The whole policy of the Forest Service might completely change" (R. 543; see also R. 698, 752).

The second assumption involved in the process is that the timber would all be removed over this road. The only basis therefor was the assertion that this road was the best route for national forest timber (R. 751). The offers of proof themselves admitted that there

were other routes which could be developed to remove this timber (R. 702, 751). The fact that the Government has condemned this road for this purpose does not indicate that no other route is available. Nor could it be assumed that other routes would not be used. As the court below said (R. 752) "that it is contingent, that may or may not happen, that it is remote and speculative" (R. 752).

Finally, appellant assumes that the timber would be sold in place to private loggers who would pay tolls for removing the timber on this road (R. 697). Here again the speculation is based simply on the Forest Service policy to sell to private operators (R. 672). And appellant's counsel recognized that such tolls would be paid only so long as the charges were reasonable (R. 698). Private loggers would have the alternative of other routes. Moreover, it is to be borne in mind that under local law persons beneficially interested in timber lands may condemn land for a logging road as the M. & D. Company started to do (R. 475; 3 Rem. Rev. Stat. Wash., sec. 936–1).

Thus, the only facts that are shown are that the national forest is there and the road is there.[11] The whole process by which the alleged value is reached imposes speculation upon conjecture. We submit that, as the district court ruled many times, this falls far short of showing that a prospect of demand existed for

[11] The fact that the Government has taken this land in order to remove timber does not indicate the extent to which it will be so used in peacetime for, as the record shows, an important factor was the harvesting of sitka spruce for the manufacture of airplanes "by the Government and our allies" (R. 45, 93).

such use in the reasonably near future so as to affect the market value of land while it was privately held. *Olson* v. *United States,* 292 U. S. 246, 255 (1934). As the court said in *Chicago, M. & St. P. Ry. Co.* v. *Alexander,* 47 Wash. 131, 91 Pac. 626, 629 (1907) "it is not intended that owners of property may recover excessive damages based upon fictitious, visionary or remote contingencies, which may or may not at some indefinite time in the future increase the value of the land."

A case directly in point is *Meskill & Columbia C. R. Co.* v. *Luedinghaus,* 78 Wash. 366, 139 Pac. 52 (1914) where a right-of-way for a logging road was condemned through a canyon (see R. 698). An offer "to show the value of the property taken for the purpose of a toll or public logging road, based upon the assumption that all the logs from the watershed of Hope Creek would eventually pass down this canyon, as they claimed it was the most available outlet" was refused on the ground the evidence was too remote and speculative. This exclusion was affirmed on appeal, the court saying (p. 368):

> * * * The timber upon the watershed of Hope creek was owned by other parties. When it would be logged, and in what manner and by what route the logs would be transported, were matters which were contingent upon the will of the owners alone. This being true, the value, if any, which the logging of that particular land might add to the value of the land in Hope creek canyon would be remote and speculative. * * *

And in *King County* v. *Joyce,* 96 Wash. 520, 165 Pac. 399 (1917) a similar result was reached, the court stating (p. 402):

> The possible sale of a right of way or an abandoned railroad grade to one who may, at some future time, negotiate therefor, is a pleasing hope, but we find no reason or authority for holding it be a convertible asset.

So also, in the instant case, the possibility of obtaining tolls from timber moving from the national forest over this road is a "pleasing hope" but not a "convertible asset."

CONCLUSION

For the foregoing reasons it is submitted that the judgment below should be affirmed.

Respectfully,

DAVID L. BAZELON,
Assistant Attorney General.
J. CHARLES DENNIS,
United States Attorney,
Seattle, Washington.
ROGER P. MARQUIS,
JOHN F. COTTER,
Attorneys, Department of Justice,
Washington, D. C.

DECEMBER 1946.

APPENDIX

The Annual Report of the Secretary of Agriculture for the Year 1936

[pp. 113–114]

ROAD CONSTRUCTION

Road construction administered by the Department during the year included work on the main through highways, the construction of secondary roads reaching into farming areas, extensions of the main system into and through municipalities, the improvement of roads in Federal areas, and the elimination of railroad-highway grade crossings.

A total of 27,373 miles of highways, roads, and trails, and 310 grade crossing structures were brought to completion during the year. Of this mileage, 22,133 was improved with Federal funds administered solely by the Department. The remainder consisted of 204 miles of national-park roads built for the National Park Service by the Bureau of Public Roads; 2,319 miles of loan-and-grant projects of the Public Works Administration, also supervised by the Bureau of Public Roads; and 2,718 miles in work-relief projects, the labor on which was supplied by the Federal Emergency Relief Administration. Other costs connected with these projects were paid with Public Works funds, and supervision was furnished by the Bureau of Public Roads and several State highway departments.

The major activity of the Department in road construction consisted of the administration of funds

provided as direct grants to the States for relief of unemployment through highway and grade crossing work and as Federal aid to the States for highway purposes. The work was carried on cooperatively with the various State highway departments in accordance with the general plan of administration of Federal aid for highways, but modified to meet the need of giving employment to those on relief rolls.

Work of this kind resulted in the completion during the year of 13,789 miles of roads and streets—7,355 miles on the Federal-aid highway system outside of cities, 755 miles on city extensions of the Federal-aid system, and 5,679 miles of secondary or feeder roads. On these classes of highways combined there were completed 310 railroad-highway grade-separation structures. Also completed were improvements on 22 miles of flood-damaged highways, on 236 miles of forest highways, and on 436 miles of highways through other public lands built by the Bureau of Public Roads, and 5,684 miles of forest roads and 1,965 miles of trails built by the Forest Service.

The current program at the end of the year involved a total of 25,812 miles in all classes of projects. It comprised 10,006 miles on the Federal-aid system outside of cities, 991 miles on city extensions of the system, 7,921 miles of secondary or feeder roads, 716 miles of forest highways, 261 miles of public-lands highways, 537 miles of national-park highways, 2,478 miles of loan-and-grant projects, and 2,902 miles of work-relief roads, the last three supervised by the Bureau of Public Roads as agent for other Federal departments. The current program also included 1,664 structures separating the grades between railroads and highways.

tion during the year projects of several classes involving the improvement of 17,513 miles of road. The greater part of this work was carried on in cooperation with, and under the immediate supervision of the State highway departments. In this way, during the year, improvements were completed on 9,333 miles of the rural portion of the Federal-aid highway system, 2,037 miles of secondary or feeder roads, and 760 miles of roads and streets in municipalities. The lesser part of the work, done without substantial State cooperation, includes improvements in the national forests and parks, the reconstruction of flood-damaged roads and supervision of the construction of roads financed with funds allotted by the Public Works Administration and the Works Progress Administration. The mileage of roads improved during the year in such exclusively Federal projects aggregated 5,383. Work in the national forests was supervised both by the Bureau of Public Roads and the Forest Service. The other classes of work were supervised by the Bureau of Public Roads, acting in most instances, under interdepartmental agreements, as the engineering agency of other Federal agencies.

The secondary and feeder-road programs, financed by special appropriations which now must be matched by the States, serves to extend improvement to a considerable mileage of the more important farm-to-market roads.

The roads built in the national forests and parks, in the Indian reservations, and on western public lands, are essential to the development and care of Federal reservations. They are necessary also to permit traffic through such areas, and to give access to areas of great natural beauty.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 11342

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POLSON LOGGING COMPANY,
a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT, OF WASHINGTON SOUTHERN DIVISION

Appellant's Reply Brief

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FILED
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CLERK

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

POLSON LOGGING COMPANY,
a corporation,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

I

THE PROPOSED TAKING IS UNAUTHORIZED BY THE STATUTES RELIED ON

Of the statutes given in the several Declarations of Taking as authority to acquire, the Government now wholly abandons the Act of June 4, 1897, 30 Stat. 34-36, and Acts supplementary thereto and amendatory thereof, 16 U.S.C.A. Sections 473-482, and 551, and the Act of September 5, 1940, 54 Stat. 867. It now relies solely upon:

1. The General Condemnation Act of August 1, 1888, 25 Stat. 357, 40 U.S.C.A. Section 257.

2. The Department of Agriculture Appropiation Act 1942, 55 Stat. 408.

3. The Federal Highway Act of November 9, 1921, 42 Stat. 218, 23 U.S.C.A. Secs. 1-25 as amended by the Act of July 13, 1943, 57 Stat. 560, and

4. The Department of Agriculture Appropriation Act 1944, 57 Stat. 392. See Government's brief, page 2.

First and Second Declarations of Taking

Only the first two of the Acts now relied on were cited in the First and Second Declarations of Taking. The validity or effectiveness of those Declarations therefore depends on those two Acts alone. The General Condemnation Act grants no authority to acquire but merely authorizes condemnation where such authority had been otherwise and independently granted. See Appellant's Opening Brief p. 50, Government's brief p. 12.

The Department of Agriculture Appropriation Act 1942 grants no authority to acquire for the reasons pointed out in Appellant's Opening Brief pp. 55-62. The Government concedes that the appropriations made in the section of that act dealing with "FOREST ROADS AND TRAILS" which

were specifically "for carrying out the provisions of Sections 23 of the Federal Highway Act approved November 9, 1921 (23 U.S.C.A. 23)" grant no authority to acquire. Govt. Br. p. 23. The Government, however, argues that the appropriation in general language in the section of that act dealing with salaries and expenses of the forest service for "all expenses necessary for the use, maintenance, improvement, protection, and general administration of the national forests constitutes a grant of the requisite authority." Govt. Br. p. 16. The *Threlkeld* case, 72 Fed. 2nd 464 does not support such argument nor warrant the conclusion drawn by the Government. The decision in that case was rested solely on the fact that the Appropriation Act there involved in terms made an appropriation for the "*construction and maintenance* of roads, trails, bridges," etc. The argument of the Court as to the "necessity" of the situation then before it was solely to support and sustain its conclusions that "the broad authority to *construct and maintain* roads and other improvements includes the power to acquire land for the purpose if it is necessary." (Cf. Appt. Op. Bf. p. 28.) Moreover, the "necessity" which the Court found present in the *Threlkeld* case did not exist in 1942-44 because "We (the Department of Agriculture) are building a fairly substantial mileage, not only to

open up new bodies of timber but also to reach areas where strategic minerals may be obtained. We are being supplied with money for that purpose from a special fund which was authorized for appropriation a year or two ago for the purpose of aiding the military effort. Of that fund about $10,000,000.00 was allocated to timber and mineral access roads. To date we have been asked to supervise project work which will cost about $2,800,000.00 to cover the construction, improvement or maintenance of about 1,200 miles of these access roads, of which about 45% is for timber and the balance for minerals." See testimony of C. M. Granger, Assistant Chief of the United States Forest Service at Hearing before the subcommittee of the committee on appropriations of the House of Representatives on the Agriculture appropriation bill for 1944 at page 594, set out in full in the Appendix to this brief.

Furthermore, since, in the enumeration of the purposes of the appropriation made by the 1942 Appropriation Act for salaries and expenses of the Forest Service, "the *maintenance* of roads and trails" is specifically set out, the subsequent specification of "all expenses necessary for the use, maintenance, improvement, protection and general administration of the national forest" is as clearly

for entirely different and non-overlapping purposes as though the latter clause had read, for "all *other* expenses," etc. (See Appendix, Appt. Op. Bf. pp. 110-112.)

The Government seeks to avoid the change in construction indubitably resulting from the change in the language of the Department of Agriculture Appropriation Acts following the decision in the *Threlkeld* case by reports of the Secretary of Agriculture as to road construction. Significantly, however, no instance is reported of the acquisition, whether by purchase, condemnation or otherwise of any right-of-way. And no decision is cited, and we believe none exists, which construes any Department of Agriculture Appropriation Act since 1934 as a grant of authority to the Secretary of Agriculture to acquire rights-of-way.

The Government's argument is inclusive and wholly insufficient to overcome the presumption arising from the change in the statutory language. The reports quoted in the appendix to the Government's brief are undoubtedly the reports required by Sec. 19 of the Federal Highway Act of November 9, 1921. 23 U.S.C.A. Sec. 20. The highways, roads and trails which in said reports were stated as having been constructed or improved were either on rights-of-way provided by states or municipali-

ties, or were on public lands over which no right-of-way had to be acquired other than the appropriation of the particular land needed from "the department supervising the administration of such land or reservation" in the manner prescribed by Sec. 17 of said Highway Act. 23 U.S.C.A. Sec. 18.

Third Declaration of Taking

The third declaration of taking cites the four Acts now relied on as authority for the proposed Taking. It is conceded that the General Condemnation Acts is no such authority. The Department of Agriculture Appropriation Act of 1942 grants no such authority for the reasons already given and for the following further reasons:

1. It made appropriations for "the fiscal year ending June 30, 1942." With the expiration of that year the appropriations lapsed, the Act itself became *functus officio* and any authority that might have been implied from the appropriations made therein died with the appropriations themselves. The Third Declaration of Taking was dated November 2, 1943, and filed in the District Court Nov. 12, 1943 (R. 82-85).

2. The Department of Agriculture Act 1942 was held by the District Court to grant no authority to acquire, and that ruling was embodied in its

Order of Nov. 12, 1943. (R. 75.) The Government acquiesced in that ruling and after that order was made filed a new and third Declaration of Taking which was expressly stated to be "in lieu of" the second Declaration of Taking. (R. 81). By such action the Court's ruling that the Appropriation Act of 1942 granted no authority to acquire, became the law of the case and the Government became and is bound thereby. 3 Enc. of Fed. Procedure (2nd Ed.) Sec. 689 p. 313, citing in note 93 at page 317 the decision of this Court in *Presidio Mining Co. vs. Overton,* 261 Fed. 933, affirmed. 270 Fed. 388 and Certiorari denied 256 U. S. 694, 65 L. Ed. 1175.

The sufficiency of the third Declaration of Taking depends therefore on the question, whether the Congressional Acts therein cited for the first time grant the requested authority to acquire. The Department of Agriculture Appropriation Act of 1944 by itself differs in no material respect from the Department Appropriation Act of 1942. That it wholly fails to grant the requested authority is fully demonstrated by what has heretofore been said in respect of the earlier Appropriation Act.

The Departmental Appropriation Act of 1944, read in conjunction with the Federal Highway Act of 1921, as that latter Act stood when the Appro-

priation Act was passed and approved, is concededly no grant of authority to acquire, because by express terms an appropriation for "construction" was not an appropriation for "costs of right-of-way." Govt. Bf. p. 23.

Thus the question is resolved down to whether an appropriation for particular purposes specified in a particular section of another statute is enlarged and extended to other purposes by the subsequent amendment of the statute referred to.

Such was not the intention of the Department of Agriculture in seeking or of the Congress in making the appropriation of $3,778,723.00 for FOREST ROADS AND TRAILS contained in the 1944 Appropriation Act. In justifying the appropriation requested and made, C. M. Granger, Assistant Chief of the National Forest Service, testifying before the Sub-committee of the House Committee on Appropriations, said:

> "There is no appropriation recommended this year for the forest highway work, which embraces the type of road which is a part of the general transportation system of the county or of the State * * *.
>
> "The amount recommended for appropriation on the forest development work is entirely for maintenance. We will undertake no construction * * * .

> "The requested appropriation for the Forest Service is to enable us to maintain existing roads and trails * * *. No construction, Mr. Chairman, it is all maintenance."

Despite the assertion to the contrary in the Government's Brief, page 25, we see no absurdity in concluding that Congress did not intend the appropriation to be for purposes not contemplated, and that it does not imply a grant of authority which was not requested.

That the Appropriation Act of 1944 and the Act of July 13, 1943 are *in pari materia* is denied. They can hardly be said to relate to the same person or thing, and certainly they do not have the same purpose or object. But even if they are, the later act may not be resorted to to determine the Congressional intent in enacting the appropriation act because that act is clear and unambiguous.

> *Greenport Basin and Construction Company vs. United States*, 260 U. S. 512, 67 Law Ed. 270;
>
> 2 *Sutherland Statutory Construction*, 3rd Edition, Section 5201, Note 1, and cases there cited.

On the contrary, the Appropriation Act of 1944 is a statute of specific reference because it "refers

specifically to a particular statute by its title or section number." 2 Sutherland Statutory Construction, 3rd Edition, Section 5207.

The cases cited in the Government's brief on pages 24-25 are inapposite in that they all involve a resort to independent statutes to resolve ambiguities or uncertainties in the particular act being construed. There is no such ambiguity or uncertainty in the language of the 1944 Appropriation Act.

The Government's contention that the amendment of the Federal Highway Act by the Act of July 13, 1943 "related back so as to validate the earlier taking of possession" (Government's Brief, page 25) is without foundation. The cases cited in support thereof deal with Acts of Congress authorizing suits against the United States for previous tortious acts of officers of the United States for which there was at the date of such acts no remedy. See *Crozier vs. Krupp*, 224 U. S. 290, at page 305, 56 Law Ed. 771 at page 776. *Shoshone Tribe vs. United States*, 299 U. S. 476, 81 Law Ed. 360.

Taking of Gravel Lands Was Unauthorized

The Government cites *Cameron Development Co. vs. United States*, 145 Fed. (2) 209, and *United States vs. Rayno*, 136 Fed. (2) 376 (Gov-

ernment's Brief, page 28) as sustaining the taking of the so-called gravel lands, Tracts 2 and 3, and as its only answer to appellant's contention that such taking was in any event wholly unauthorized. In neither of those cases was the authority to take in question. Both were concerned, the first wholly and the second primarily, with the question whether the fact that the government made use of materials which were found in lands that it had lawfully taken, but which were valueless at the time of the taking, was an element to be considered in determining just compensation.

II

ERRORS IN THE SUBMISSION OF THE COMPENSATION ISSUE

The argument advanced on behalf of the government is, as it seems to us, quite obviously a studied attempt to evade the issues raised and points made by appellant. The government does not in any way dispute that the roads taken or attempted to be taken were beyond question adaptable and available for the removal of more than a billion feet of the timber in the Olympic National Forest, that it was not merely reasonably probable that such timber would move out over these roads but physical and practical considerations made such

removal almost inevitable, and that a prospective purchaser would pay an increased price for the roads because of those facts which would be taken into consideration in the negotiation of a price between informed buyers and sellers. The government merely asserts that appellant is seeking to capitalize on the needs of the government. It brushes aside appellant's disclaimer of any attempt to recover what may be the peculiar value to the government of the property, disregards wholly the testimony, the rejection of which is complained of by appellant and in the face of admitted facts, asserts that this case is not what it precisely is, namely, one where the value of appellant's property has been enhanced because it adjoins the National Forest.

Appellant's position is fully sustained by the rule announced by the Supreme Court of the United States in *United States vs. Miller*, 317 U. S. 369, 377, 87 Law Ed. 337, 344, as follows:

> "The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement."

Appellant's lands were not probably within the scope of the Olympic National Forest, if for no other reason, because Congress, by its Acts of March 4, 1907 and June 25, 1910, 16 U.S.C.A. 471 (a), prohibited any addition to that forest except as and to the extent expressly authorized by it. They were merely adjacent lands and their taking for the use and benefit of the forest, that is, the enlargement of the forest project to include them, ought not to deprive appellant of the value added to those lands by the proximity of the forest.

Appellant's proferred evidence was not based on speculation, but was within the rule of *Olson vs. United States*, 292 U. S. 246, 78 Law Ed. 1236, directed to elements affecting value that depended on events which not merely were fairly shown to be reasonably probable, but which in part had occurred and in further part, were practically inevitable. Thus, the roads in question were adaptable to the removal of Olympic Forest timber, had been used for hire for that purpose, were sought to be acquired by the government for that purpose, and a billion or more feet of National Forest timber will "necessarily move out over them."

Appellant was not merely barred from proving value based on elements which would enhance the price negotiated by informed buyers and sellers,

but was barred from proving not merely the reasonable probability, but the well nigh inevitableness of the events on which such elements depend.

The government's suggestion that persons beneficially interested in timber lands may condemn lands of others for a logging road (Government's Brief, page 35), if it proves anything, proves appellant's point. Such a condemnation proceeding would be instituted only if the tolls charged by appellant for the use of its roads were unreasonable and the estimated outlay therefor was believed to be greater than the cost of acquiring a right-of-way for and constructing a new road. It is not reasonably probable that appellant, or any one owning the road here involved, would charge such excessive tolls as to force a prospective user thereof into constructing another and competing road.

WHEREFORE, the case should be reversed and remanded with instructions as prayed in appellant's opening brief.

Respectfully submitted,

L. B. DONLEY
F. D. METZGER
METZGER, BLAIR GARDNER & BOLDT,
Attorneys for Appellant,
POLSON LOGGING COMPANY.

Appendix

HEARINGS

BEFORE THE
SUB-COMMITTEE OF THE
COMMITTEE ON APPROPRIATIONS
HOUSE OF REPRESENTATIVES

SEVENTY-EIGHTH CONGRESS

ON THE

AGRICULTURE DEPARTMENT
APPROPRIATION BILL FOR 1944
(pp. 597-599)

FOREST ROADS AND TRAILS

Mr. Tarver. Forest roads and trails. The table at the top of page 99 will be inserted into the record at this point.

Forest Roads and Trails

Appropriation Act, 1943	$7,000,000
Proposed transfer in 1944 estimates to "Salaries and expenses, Bureau of Agricultural Economics, economic investigations	34,665

Total available, 1943	6,965,335
Budget estimate, 1944	3,778,723
Decrease (including decrease of $12,862 travel funds returned to surplus)	3,186,612

Mr. Tarver. Mr. Granger, we will be glad to hear any justification that you have to offer on this item.

Forest Road Development

Mr. Granger. Mr. Chairman, the amount recommended for the appropriation this year occurs entirely in the subdivision of the road work which has to do with what we call forest development roads and trails. These are relatively simple roads and trails whose primary purpose is to provide for the protection and the administration of the national forests and the utilization of their products.

There is no appropriation recommended this year for the forest highway work, which embraces the type of road which is a part of the general transportation system of the county or of the State. In the forest highway category construction work will be almost entirely suspended except for the completion of work under existing contracts.

It will be possible to take care of maintenance obligations and a considerable portion of hang-over construction jobs out of funds that are still available out of former appropriations.

The amount recommended for appropriation on the forest development work is entirely for maintenance. We will undertake no construction. This sum will barely provide for what you might call the common standard and quality of minimum maintenance to keep existing and needed roads in usable condition, and to prevent loss in the large construction investment. The roads are being used now more for essential needs than almost at any other time in the past because of the heavy movement of timber which is being brought out, and to intensified fire protection, so it is extremely important that we be able to keep the roads in operating condition.

Additional Road Mileage

Mr. Tarver. In your production of a considerable additional amount of timber for lumber from the national forests have you found it necessary to build a considerable mileage of roads in order to get at the timber?

Mr. Granger. Yes, sir. We are building a fairly substantial mileage, not only to open up new bodies

of timber but to reach areas where strategic minerals may be obtained. We are being supplied with money for that purpose from a special fund which was authorized for appropriation a year or two ago for the purpose of aiding the military effort. Of that fund about $10,000,000 was allocated to timber and mineral access roads. To date we have been asked to supervise project work which will cost about $2,800,000 to cover the construction, improvement or maintenance of about 1,200 miles of these access roads, of which about 45 percent is for timber and the balance for minerals.

Mr. Tarver. Other funds will continue to be available for these purposes during the next fiscal year from the special fund to which you have made reference?

Mr. Granger. Yes, sir. I understand some of that fund is still unallocated.

Mr. Norcross. The money the Forest Service is expending comes from an appropriation for the Public Roads Administration. On these low-standard roads the Forest Service is supervising and doing work requested of it by P. R. A. I don't know how much its appropriation is.

Mr. Tarver. The amount of the appropriation sought here in this item is not intended for the

purpose of constructing roads to reach timber supplies or strategic minerals?

Mr. Granger. That is right, Mr. Chairman.

Mr. Tarver. This was taken care of under the appropriations to which you referred?

Mr. Granger. Yes, sir. The requested appropriation for the Forest Service is to enable us to maintain existing roads and trails.

Mr. Tarver. It is for maintaining existing roads and perhaps for the construction of additional roads necessary in your fire-prevention work?

Mr. Granger. No construction, Mr. Chairman. It is all maintenance.

see V. 2447

No. 11350

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MASTER LUBRICANTS COMPANY, a corporation,
Appellant,

vs.

GEORGE O. COOK, MINNIE M. COOK, IGNATIUS F. PARKER, Trustee in Bankruptcy of the Estates of George O. Cook and Minnie M. Cook, Bankrupts,
Appellees.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

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FILED
AUG 19 1946
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CLERK

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

No. 11350

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MASTER LUBRICANTS COMPANY, a corporation,
Appellant,

vs.

GEORGE O. COOK, MINNIE M. COOK, IGNATIUS F. PARKER, Trustee in Bankruptcy of the Estates of George O. Cook and Minnie M. Cook, Bankrupts,
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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INDEX TO EXHIBITS.

Objecting Creditor's Exhibits:

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For Appellee Ignatius F. Parker, Trustee, etc.:

IGNATIUS F. PARKER
636 H. W. Hellman Building,
Los Angeles 13, Calif. [1*]

*Page number appearing at foot of Certified Transcript.

DEBTOR'S PETITION

Form No. 1

In the District Court of the United States for the Southern District of California
Central Division

In Bankrupty. No. 43317 Y

In the Matter of the Estate of
GEORGE O. COOK,

Bankrupt.

To the Honorable.....Judge of the District Court of the United States for the Southern District of California:

The Petition of George O. Cook, Residing at No. 1513 West 105th Street, in the City of Los Angeles, County of Los Angeles, State of California, by occupation a Salesman and truck driver, and employed by Ken Goins, 8601 Long Beach Blvd. (or engaged in the business of .....), respectfully represents:

1. Your petitioner has had his principal place of business (or has resided, or has had his domicile) at 1513 West 105th St., Los Angeles, California, within the above judicial district, for a longer portion of the six months immediately preceding the filing of this petition than in any other judicial district.

2. Your petitioner owes debts and is willing to surrender all his property for the benefit of his creditors except such as is exempt by law, and desires to obtain the benefit of the Act of Congress relating to bankruptcy

3. The schedule hereto annexed, marked Schedule A, and verified by your petitioner's oath, contains a full and true statement of all his debts, and, so far as it is possible to ascertain, the names and places of residence of his creditors, and such further statements concerning said debts as are required by the provisions of said Act.

4. The schedule hereto annexed, marked Schedule B, and verified by your petitioner's oath, contains an accurate inventory of all his property, real and personal; and such further statements concerning said property as are required by the provisions of said Act.

Wherefore your petitioner prays that he may be adjudged by the court to be a bankrupt within the purview of said Act.

GEORGE O. COOK,
Petitioner.

J. EVERETT BROWN,
Attorney for Petitioner.

State of California, County of Los Angeles—ss.

I, George O. Cook, the petitioner named in the foregoing petition, do hereby make solemn oath that the statements contained therein are true according to the best of my knowledge, information and belief.

GEORGE O. COOK, Petitioner.

Subscribed and sworn to before me this 9th day of June, 1944.

[Seal] J. EVERETT BROWN,
Notary Public in and for the County of Los Angeles,
State of California.

(Official Character.) [2]

SUMMARY OF DEBTS AND ASSETS

(From the Statements of the Debtor in Schedules A and B)

			Dollars	Cents
Schedule A	1—a	Wages	None	
Schedule A	1—b (1)	Taxes due United States	None	
Schedule A	1—b (2)	Taxes due States	None	
Schedule A	1—b (3)	Taxes due counties, districts and municipalities	None	
Schedule A	1—c (1)	Debts due any person, including the United States, having priority by laws of the United States	None	
Schedule A	1—c (2)	Rent having priority	None	
Schedule A	2	Secured claims	None	
Schedule A	3	Unsecured claims	3424	80
Schedule A	4	Notes and bills which ought to be paid by other parties thereto	None	
Schedule A	5	Accommodation paper	None	
		Schedule A, total	3424	80

Schedule B	1	Real estate	None
Schedule B	2—a	Cash on hand	None
Schedule B	2—b	Negotiable and non-negotiable instruments and securities	None
Schedule B	2—c	Stocks in trade.....	none
Schedule B	2—d	Household goods	100.00
Schedule B	2—e	Books, prints and pictures	None
Schedule B	2—f	Horses, cows and other animals	None
Schedule B	2—g	Automobiles and other vehicles	None
Schedule B	2—h	Farming stock and implements	None
Schedule B	2—i	Shipping and shares in vessels.....	None
Schedule B	2—j	Machinery, fixtures, and tools.....	None
Schedule B	2—k	Patents, copyrights, and trade-marks.....	None
Schedule B	2—l	Other personal property	None
Schedule B	3—a	Debts due on open accounts	None
Schedule B	3—b	Policies of insurance..	None
Schedule B	3—c	Unliquidated claims....	None
Schedule B	3—d	Deposits of money in banks and elsewhere	None

Schedule B	4	Property in reversion, remainder, expectancy or trust, etc.....	None
Schedule B	5	Property claimed as exempt ($3100.00)	
Schedule B	6	Books, deeds and papers	None
		Schedule B, total	3100.00

George O. Cook, Petitioner

(1) [3]

SCHEDULE A STATEMENT OF ALL DEBTS OF BANKRUPT

Schedule A-1.

Statement of all creditors to whom priority is secured by the act.

	Amount due or Claimed Dollars Cents
A.—Wages due workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt, to an amount not exceeding $600 each, earned within three months before filing the petition.	
Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, un-	

liquidated or disputed.—Nature and consideration of the debt; and whether incurred or contracted as partner or joint contractor and, if so, with whom None

B.—Taxes due and owing to—(1)The United States ..... None

(2) The State of.....

(3) The county, district or municipality of..... ..... State of.....

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom.

C.—(1) Debts owing to any person, including the United States, who by the laws of the United States is entitled to priority. None

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom. None

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C.—(2) Rent owing to a landlord who is entitled to priority by the laws of the State of ....., accrued within three months before filing the petition, for actual use and occupancy. None

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—When and where incurred or contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt: and whether incurred or contracted as partner or joint contractor and, if so, with whom. None

Total None

George O. Cook, Petitioner

(2) [4]

Schedule A-2.

Creditors Holding Securities

B.—Particulars of securities held, with dates of same, and when they were given, to be stated under the names of the several creditors, and also particulars concerning each debt, as required by the Act of Congress relating to Bankruptcy, and whether contracted as partner or joint contractor with any other person, and if so, with whom.)

	Value of Securities Dollars Cents	Amount due or Claimed Dollars Cents
Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).		

—Description of Securities.—When and where debts were contracted, and nature and consideration thereof.—Whether claim is contingent, unliquidated or disputed.	
	None
Total	None

George O. Cook, Petitioner

(3) [5]

Schedule A-3

Creditors whose Claims are Unsecured

(N. B.—When the name and residence (or either) of any drawer, maker, endorser, or holder of any bill or note, etc., are unknown, the fact must be stated, and also the name and residence of the last holder known to the debtor. The debt due to each creditor must be stated in full, and any claim by way of set-off stated in the schedule of property.)

Reference to Ledger or Voucher.—Names of Creditors.—Residences (if unknown, that fact must be stated).—Names and resi- contracted.—Whether claim is contingent, unliquidated or disputed.—Nature and consideration of the debt, and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person; and if so, with whom.	Amount due or Claimed Dollars Cents

A judgment obtained by Master Lubricants Company, a corporation, in an action in the Superior Court of Los Angeles County, California, being Number 466 250, wherein a Chattel Mortgage was foreclosed and a judgment obtained against George O. Cook and Minnie M. Cook. There is now due, after a sale under execution, which occurred in 1942, the approximate sum of	3281.60
Address of creditor is in care of James P. Clark, attorney for said creditor, at 704-6 Grant Bldg., Los Angeles, Calif. A judgment entitled Coast Adjustment & Finance Corporation, a corporation, being Number 600 665, in the Municipal Court, City of Los Angeles, California. Zide, Kamens & Zide attorneys for creditor, whose address is 923 Chester Williams Bldg., Los Angeles, California.	97.15
A judgment entitled First Industrial Loan Company of California, a corporation, plaintiffs, being Number 602 287 in the Municipal Court of the City of Los Angeles, California, for Walter H. Sprague Attorney, whose address is 415 Los Angeles Stock Exchange Office Bldg., Los Angeles, California	46.05
Mrs. M. E. Miller, 215 Horizon, Venice California	500.00
Total	3424.80

George O. Cook, Petitioner

Schedule A-4.

Liabilities on Notes or Bills Discounted which ought to be Paid by the Drawers, Makers, Acceptors, or Indorsers. (N. B.—The dates of the notes or bills, and when due, with the names, residences, and the business or occupation of the drawers, makers, acceptors, or indorsers thereof, are to be set forth under the names of the holders. If the names of the holders are not known, the name of the last holder known to the debtor shall be stated, and his business and place of residence. The same particulars shall be stated as to notes or bills on which the debtor is liable as indorser.)

	Amount due or Claimed Dollars Cents
Reference to Ledger or Voucher.—Names of holders as far as known.—Residences (if unknown, that fact must be stated).—Place where contracted.—Whether claim is disputed.—Nature and consideration of liability, whether same was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	None
Total	None

George O. Cook, Petitioner.

Schedule A-5

Accommodation Paper

(N. B.—The dates of the notes or bills, and when due, with the names and residences of the drawers, makers, acceptors, and indorsers thereof, are to be set forth under the names of the holders; if the debtor be liable as drawer, maker, acceptor, or indorser thereof, it is to be stated accordingly. If the names of the holders are not known, the name of the last holder known to the debtor should be stated, with his residence. Give same particulars as to other commercial paper.)

	Amount due or Claimed Dollars Cents
Reference to Ledger or Voucher.—Names of Holders.—Residences (if unknown, that fact must be stated).—When and where dences of persons accommodated.—Place where contracted.—Whether claim is disputed.—Whether liability was contracted as partner or joint contractor, or with any other person; and, if so, with whom.	None
Total	None

George O. Cook, Petitioner.

Oath to Schedule A

State of California }
County of Los Angeles } ss

I, George O. Cook, the person whose name subscribed to the foregoing schedule, do hereby make solemn oath

that the said schedule is a statement of all my debts, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information, and belief.

George O. Cook, Petitioner.

Subscribed and sworn to before me this 9th day of June, 1944.

J. Everett Brown,

Notary Public In and for the County of Los Angeles, State of California.

(Official Character.)

(6) [8]

SCHEDULE B. STATEMENT OF ALL PROPERTY

Schedule B-1
Real Estate

	Estimated value of Debtors Interest Dollars Cents
Location and Description of all Real Estate owned by Debtor, or held by him, whether under deed, lease or contract.—Incumbrances thereon, if any, and dates thereof.—Statement of particulars relating thereto.	
The East 40 feet of the So. 135 feet of Lot 7, of Sunnyside Heights, as per map recorded in Book 8, Page 88 of Maps, in the office of the County Recorder of Los Angeles County, State of California. Acquired on the 6th day	

of February, 1939 by George O. Cook and Minnie M. Cook, his wife, who placed a Declaration of Homestead alleging that the actual cash value of the land and premises was $3000.00	3000.00
That said Declaration of Homestead was recorded on June 22nd, 1940, in Book 17599, at Page 120 of Official Records of Los Angeles County, State of California. And the same has never been revoked.	
Total	3000.00

George O. Cook, Petitioner.

(7) [9]

Schedule B-2

Personal Property

	Dollars Cents
A.—Cash on hand	None
B.—Negotiable and non-negotiable instruments and securities of any description, including stocks in incorporated companies, interests in joint stock companies, and the like (each to be set out separately)	None
C.—Stock in trade, in.....business of..... at, ..., of the value of.....	None

D.—Household goods and furniture, household stores, wearing apparel and ornaments of the person	
The above items, the petitioner claims an exemption under the laws of the State of California	100.00
Total	100.00

George O. Cook, Petitioner.

(8) [10]

Personal Property

	Dollars Cents
E.—Books, Prints, and Pictures	None
F.—Horses, Cows, Sheep, and other animals (with number of each)	None
G.—Automobiles and other Vehicles	None
H.—Farming Stock and Implements of Husbandry	None
Total	None

George O. Cook, Petitioner.

(9) [11]

Schedule B-2—Continued

Personal Property

	Dollars Cents
I.—Shipping, and Shares in Vessels	None
J.—Machinery, fixtures, apparatus, and tools used in business, with the place where each is situated	None
K.—Patents, Copyrights, and Trade-Marks	None
L.—Goods or personal property of any other description, with the place where each is situated	None
Total	None

George O. Cook, Petitioner.

(10) [12]

Schedule B-3

Choses in Action

	Dollars Cents
A.—Debts Due Petitioner on Open Account	None
B.—Policies of Insurance	None
C.—Unliquidated Claims of every nature, with their estimated value.	None
D.—Deposits of Money in Banking Institutions and Elsewhere	None
Total	None

George O. Cook, Petitioner.

(11) [13]

Schedule B-4

Property in reversion, remainder or expectancy, including property held in trust for the Debtor or subject to any power or right to dispose of or to charge.

(N. B.—A particular description of each interest must be entered, with a statement of the location of the property, the names and description of the persons now enjoying the same, the value thereof, and from whom and in what manner debtor's interest in such property is or will be derived. If all or any of the debtor's property has been conveyed by deed of assignment, or otherwise, for the benefit of creditors, the date of such deed should be stated, the name and address of the person to whom the property was conveyed, the amount realized as the proceeds thereof, and the disposal of the same, as far as known to the debtor.)

General Interest.	Particular Description.	Estimate Value of Interest. Dollars Cents
Interest in Land		None
Personal Property		None
Property in Money, Stock, Shares, Bonds, Annuities, etc.		None
Rights and Powers, Legacies and Bequests		None
	Total	None

Property heretofore conveyed for benefit of creditors.

	Amount realized as proceeds of property conveyed
Portion of debtor's property conveyed by deed of assignment, or otherwise, for the benefit of creditors; date of such deed, name and address of party to whom conveyed; amount realized therefrom, and disposal of same as far as known to debtor.	None
Attorney's Fees.	
Sum or sums paid to counsel, and to whom, for services rendered or to be rendered in this bankruptcy.	25.00
Total	25.00

George O. Cook, Petitioner.

(12) [14]

Schedule B-5

Property claimed as exempt from the operation of the act of Congress relating to bankruptcy.

(N. B.—Each item of property must be stated, with its valuation, and, if any portion of it is real estate, its location, description and present use.)

	Valuation Dollars Cents
Property claimed to be exempt by the laws of the United States, with reference to the statute creating the exemption	None

Property claimed to be exempt by State laws, with reference to the statute creating the exemption.	
The East 40 feet of the So. 135 Feet of Lot 7, of Sunnyside Heights, as per map recorded in Book 8, Page 88 of Maps, in the office of the County Recorder of Los Angeles County, State of California. Acquired on the 6th day of February, 1939 by George O. Cook and Minnie M. Cook, his wife, who placed a Declaration of Homestead alleging that the actual cash value of the land and premises was $3000.00.	3000.00
That said Declaration of Homestead was recorded on June 22nd, 1940, in Book 17599, at Page 120 of Official Records of Los Angeles County, State of California. And the same has never been revoked. It is exempt under Sections 1237 & 1238 of Civil Code of the State of California.	
Household goods & furniture, household stores, wearing apparel and ornaments of the person, are exempt under Section 690 to 690.50, Code of Civil Procedure of the State of California.	100.00
Total	3100.00

George O. Cook, Petitioner.

Schedule B-6

Books, Papers, Deeds and Writings relating to Debtor's Business and Estate

The following is a true list of all books, papers, deeds and writings, relating to petitioner's trade, business, dealings, estate and effects, or any part thereof, which, at the date of this petition, are in petitioner's possession or under petitioner's custody and control, or which are in possession or custody of any person in trust for petitioner, or for petitioner's use, benefit, or advantage; and also of all others which have been heretofore, at any time, in petitioner's possession, or under petitioner's custody, or control, and which are now held by the parties whose names are hereinafter set forth, with the reason for their custody of the same.

	Dollars Cents
Books	None
Deeds	None
Papers	None

George O. Cook, Petitioner.

Oath to Schedule B

State of California
County of Los Angeles } ss

I, George O. Cook, the person who subscribed to the foregoing schedule, do hereby make solemn oath that the schedule is a statement of all my property, real and personal, in accordance with the Act of Congress relating to bankruptcy, according to the best of my knowledge, information and belief.

George O. Cook, Petitioner.

Subscribed and sworn to before me this 9th day of June, 1944.

J. Everett Brown,

Notary Public In and for the County of Los Angeles, State of California.

(Official Character)

(14)

[Endorsed]: Filed Jun. 13, 1944. [16]

United States District Court
Southern District of California

ORDERS OF ADJUDICATION AND OF GENERAL REFERENCE

At Los Angeles, in said District, on June 13, 1944.

The respective petitions of each of the petitioners in the proceedings hereinafter mentioned, filed on the respective dates hereinafter indicated, that he be adjudged a bankrupt under the Act of Congress relating to bankruptcy, having been heard and duly considered; and there being no opposition thereto;

It is adjudged that each of said petitioners is a bankrupt under the Act of Congress relating to bankruptcy; and

It is thereupon ordered that the said proceedings be, and they hereby are, referred generally to the referees in bankruptcy of this Court, whose names appear opposite the respective proceedings hereinafter mentioned, to take such further proceedings therein as are required and permitted by said Act, and that each of the said bankrupts shall henceforth attend before said referee and submit to such orders as may be made by him or by a Judge of this Court relating to said bankruptcy.

Number	Title of Proceedings	Filed	Referee
43,317-Y	George O. Cook	6-13-44	Hugh L. Dickson, Esq., Los Angeles, Calif.

BEN HARRISON
United States District Judge

[Endorsed]: Filed Jun. 13, 1944. [17]

[Title of District Court and Cause.]

In Bankruptcy. No. 43,317-Y.

TRUSTEES REPORT OF EXEMPTED PROPERTY

At Los Angeles, California, on the 17th day of July, 1944.

The following is a Schedule of Property designated and set apart to be retained by the Bankrupt aforesaid as his own property, under the provisions of the acts of Congress relating to Bankruptcy.

General Head	Particular Description	Value Dollars Cents
Military Uniform arms and equipment		
Property exempted by State Laws	Household goods and furniture, household stores, wearing apparel and ornaments of the person.	100.00
	The East 40 feet of the South 135 feet of Lot 7, of Sunnyside Heights, as per map recorded in Book 8, Page 88 of Maps in the office of the County Recorder of Los Angeles County, State of California.	3,000.00

The Trustee is advised that said real property is located at 1513 West 105th St., Los Angeles, California.

Reported exempt by reason of Declaration of Homestead thereon recorded June 22, 1940, in Book 17599, at Page 120 of Official Records in the office of the County Recorder of Los Angeles County, California.

cc—J. Everett Brown,
319 Wilcox Building,
Los Angeles 12, California
Attorney for Bankrupt.

cc—James P. Clark,
Attorney at Law,
706 Grant Building,
Los Angeles 13, California.

Ignatius F. Parker.
Trustee

[Endorsed]: Filed Jul. 17, 1944. Hugh L. Dickson, Referee.

[Endorsed]: Filed Feb. 7, 1946. [34]

In the District Court of the United States,
Southern District of California,
Central Division

In Bankruptcy. No. 43,318-Y.

In the Matter of
MINNIE M. COOK,
Bankrupt.

TRUSTEES REPORT OF EXEMPTED PROPERTY

At Los Angeles, California, on the 17th day of July, 1944.

The following is a Schedule of Property designated and set apart to be retained by the Bankrupt aforesaid as his own property, under the provisions of the acts of Congress relating to Bankruptcy.

General Head	Particular Description	Value Dollars Cents
Military Uniform arms and equipment		
Property exempted by State Laws	Household goods and furniture, household stores, wearing apparel and ornaments of the person.	100.00
	One 1929 Chevrolet Coupe, License No. 8k4957	70.00

The East 40 feet of the South 135 feet of Lot 7, of Sunnyside Heights, as per map recorded in Book 8, Page 88 of Maps in the office of the County Recorder of Los Angeles County, State of California.	3,000.00

The Trustee is advised that said real property is located at 1513 West 105th St., Los Angeles, California.

Reported exempt by reason of Declaration of Homestead thereon recorded June 22, 1940, in Book 17599, at Page 120 of Official Records in the office of the County Recorder of Los Angeles County, California.

cc.—J. Everett Brown, Attorney for Bankrupt.
319 Wilcox Building,
Los Angeles 12, California.

cc.—James P. Clark, Attorney at Law,
706 Grant Building,
Los Angeles 13, California.

Ignatius F. Parker.
Trustee

[Endorsed]: Filed Jul. 17, 1944. Hugh L. Dickson, Referee.

[Endorsed]: Filed Feb. 7, 1946. [35]

In the District Court of the United States,
Southern District of California,
Central Division

No. 43,317.-Y.

In the Matter of

GEORGE O. COOK,

Bankrupt.

EXCEPTIONS AND OBJECTIONS BY CREDITOR TO TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

To Hugh L. Dickson, Referee in Bankruptcy:

Comes now the Master Lubricants Company, a corporation, a creditor of the above named bankrupt, and objects and excepts to the Report of the Trustee herein, reporting as exempt by state laws, certain real property, therein described, by reason of Declaration of Homestead thereon, recorded June 22, 1940, in Book 17599, at page 120 of Official Records in the office of the County Recorder of Los Angeles County, State of California, which said real property is situate in the City of Los Angeles, County of Los Angeles, State of California, and particularly described as follows, to wit:

The east 40 feet of the South 135 feet of Lot 7 of Sunnyside Heights, as per map recorded in Book 8, page 88 of Maps in the office of the County Recorder of Los Angeles County, State of California,—

Upon the following grounds to wit:

1 That at the date of the recording of said homestead, the said bankrupt, George O. Cook and his wife, Minnie M. Cook, were and now are joint owners of the above described property.

2 That shortly after the recording of said homestead, as above set forth, and on to wit, November 15, 1941, the said bankrupt, George O. Cook, [36] separated from and abandoned his said wife Minnie M. Cook, and removed from said homestead property.

3. That in the forepart of June 1942, the wife of said bankrupt, Minnie M. Cook, commenced an action in the Superior Court of the County of Los Angeles, State of California, against her husband, the above named bankrupt, George O. Cook, for a divorce: that summons and complaint in said action were duly served upon the defendant in said action, the bankrupt, George O. Cook, but that said defendant did not appear in but made default in said action and his default was duly entered therein. That the complaint in said action did not mention any real property as belonging to said parties and did not mentione*d* and did not claim that there was a homestead thereon.

4 That thereafter and on to wit, June 30th, 1942 an Interlocutory Decree of divorce in said action was made and entered in favor of the plaintiff therein, to wit, Minnie M. Cook. That said Interlocutory Decree did not describe or mention any real property as belonging to the

parties thereto and did not mention and did not make any disposition of the homestead referred to above and set out in the said Report of Trustee.

5 That thereafter and on to wit July 1, 1943 a final decree of divorce was made and entered in said action and the same did not set forth or refer to any real property belonging to the parties to said divorce action and did mention the homestead claimed to be exempt in the said Trustee's Report and did not make any disposition of said homestead.

6 That on or about the 1st day of July, 1943, said homestead set forth and referred to in Trustee's Report, became and was abandoned by both the bankrupt, George O. Cook, and his said wife, Minnie M. Cook, and that at the time of the filing of bankrupt's petition herein, June 13, 1944, said homestead had ceased to exist and the bankrupt George O. Cook, and his former wife Minnie M. Cook, owned said property [37] as joint tenants and not otherwise and that said real property hereinabove described was and is now a part of the assets of the estate of said bankrupt, George O. Cook, and should be applied to the payment of his debts.

7 That this objecting creditor, Master Lubricants Company, a corporation, heretofore and on or about September, 1941, in an action in the Superior Court of Los Angeles County, State of California, obtained and had a judgment against, George O. Cook, the said bankrupt and Minnie M. Cook his then wife, for $3431.19 and

$12.25 costs, which said judgment was entered on September 17th, 1941 in Judgment Book 1185, page 228 of the records of the County Clerk of the County of Los Angeles. That partial satisfactions have been made on said judgment and at the date of the filing of petition of bankruptcy here there was still unpaid on said judgment the sum of $2777.16 for which amount claim has been heretofore filed herein.

Wherefore the Master Lubricants Company, a corporation, a creditor herein prays that these objections and exceptions be sustained and allowed and that the Report of Trustee, so far as it exempts the real property therein and herein described, as being exempt under homestead claimed by bankrupt thereon, be disapproved and rejected and that it be found that said real property is part of the assets of the Bankrupt, George O. Cook, to be used and applied in payment of the debts owing his creditors.

JAMES P. CLARK,

Attorney for Master Lubricants Company, a corporation, a creditor. [38]

[Verified.]

[Endorsed]: Filed Aug. 7, 1944. Hugh L. Dickson, Referee.

[Endorsed]: Filed Feb. 7, 1946. [39]

In the District Court of the United States
For the Southern District of California,
Central Division.

In Bankruptcy No. 43,317-Y and No. 43318-Y.

In the Matters of
GEORGE O. COOK and MINNIE M. COOK,
Bankrupts.

FINDINGS OF FACT AND CONCLUSIONS OF LAW UPON OBJECTIONS OF CREDITOR TO THE TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

This matter came on regularly for hearing before the Honorable Hugh L. Dickson, as Referee in Bankruptcy, on September 28th, and by continuance, on October 5, 1944, on Objections and Exceptions of Creditor Master Lubricants Company, a corporation, to the Trustees Report of Exempted property of the Bankrupts, George O. Cook and Minnie M. Cook, and said Bankrupts appearing by their attorney, J. Everett Brown, Esq. and in person, and said Creditor appearing by its attorney, James P. Clark, Esq., and the Trustee of said Bankrupt Estates, Ignatius F. Parker, appearing in person, and it having been stipulated in open Court that the above bankruptcies might be heard and tried together, and the evidence received in one might be considered in the other: and the respective parties having submitted their proofs, both oral and documentary, and said matters having been argued and briefed, and submitted for decision, and the Referee having decided the same, now makes written Findings of Fact and Conclusions of Law, separately stated, [44] as follows:

Findings Of Fact.

I

That the Bankrupts, George O. Cook and Minnie M. Cook, as husband and wife, acquired by grant deed the East 40 feet of the South 135 feet of Lot 7 of Sunnyside Heights, as recorded in Book 8, page 88 of Maps, in the office of the County Recorder of Los Angeles County, State of California, in joint tenancy, and the deed to them was recorded June 24, 1939. That a declaration of homestead, executed by both of said Bankrupts, then husband and wife, was recorded in the Office of the County Recorder of said Los Angeles County, on June 22nd, 1940, covering the above described property.

II

That shortly after the recording of said Homestead, and on November 15, 1941, the husband, George O. Cook, left the Homestead, and deserted his wife, Minnie M. Cook, and removed from said homestead property, and took up his residence at another place in Los Angeles, California.

III

That on the 29th day of May, 1942, the Bankrupt, Minnie M. Cook commenced an action for divorce in the Superior Court of Los Angeles County, State of California, against her husband George O. Cook. That summons and complaint were duly served upon the defendant in said action: that said defendant did not appear in said action but made default and his default

was duly and regularly entered therein. That the complaint in said divorce action did not mention any real property, as belonging to the parties to said action or either of them and did not mention and did not claim a homestead on any real property and did not claim any homestead rights.

That thereafter and on to wit, June 30, 1942, *and* Interlocutory Decree of Divorce between the parties was made and entered in said action and that no real property was set out or mentioned in said decree, as belonging to the parties to said action or either of them, [45] and did not mention and did not make any disposition of the homestead hereinabove referred to and or set out in the Trustee's Report of Exemptions.

That thereafter and on July 1, 1943 a final decree of divorce was made and entered in said action and said decree did not describe or mention any real property, as belonging to the parties to said action, the bankrupts herein, and did not mention and did not make any disposition of the homestead set out and described in the Trustee's Report as exempt.

IV

That the bankrupt, Minnie M. Cook, continued to reside upon the homestead, after her husband, George O. Cook, left her, until about March 1943, with her minor daughter, Lila Corine Cook, when she moved away from said homestead and has not since returned thereto or resided thereat. That the bankrupt George O. Cook, re-

turned to the homestead about March 1943, and resided thereat with his minor daughter, Lila Corine Cook, up until seven days prior to October 4, 1944, when said minor daughter went back to live with her mother, at a place other than the homestead and has continued since to reside with her mother away from said homestead. That at the time said divorce action was commenced said minor was 16 and is now 19 years of age. That shortly after the final decree was entered on July 1, 1943, George O. Cook re-married and brought his second wife to live with him on said homestead and they have continued to live thereon and they did live on said homestead property at the time of the filing of this bankruptcy proceeding, to wit June 13, 1944. That the schedules filed by both bankrupts, George O. Cook and Minnie M. Cook, claimed the hereinabove described real property as exempt homesteaded property. That said real property is still held and owned jointly.

V

That at the date of the filing of the petitions in bankruptcy [46] herein, said bankrupts were indebted to the objecting Creditor, Master Lubricants Company, a corporation in the sum of $2777.16, and a claim for this amount was allowed and filed herein.

And as Conclusions of Law the Referee *finds*:

Conclusions Of Law.

I

That the Homestead of the Bankrupts, declared on jointly held property, did not become abandoned, by reason of the divorce between the parties, under the findings of Fact herein.

II

That the objections and exceptions of the Creditor, Master Lubricants Company, a corporation to the Trustee's Report, should be overruled and said Report approved.

Let judgment be entered accordingly.

Dated this 31st day of December, 1945.

HUGH L. DICKSON,
Referee in Bankruptcy.

Approved as to form:

J. EVERETT BROWN,
Attorney for Bankrupts.

JAMES P. CLARK,
Attorney for creditor, Master Lubricants Company, a corporation.

Dated December 28, 1945.

[Endorsed]: Filed Dec. 31, 1945. Hugh L. Dickson, Referee.

[Endorsed]: Filed Feb. 7, 1946. [47]

[Title of District Court and Cause.]

In Bankruptcy No. 43,317-Y and No. 43,318-Y.

ORDER OVER-RULLING OBJECTIONS AND EXCEPTIONS OF CREDITOR TO REPORT OF TRUSTEE ALLOWING EXEMPTIONS OF BANKRUPTS AND APPROVING AND AFFIRMING REPORT.

This matter came on for hearing, pursuant to notice, before the Honorable Hugh L. Dickson, Referee in Bankruptcy, on September 28th, and by continuance, on October 5th, 1944, on Objections and Exceptions of Creditor, Master Lubricants Company, a corporation, to the Trustee's Report of exempted property of the Bankrupts, George O. Cook and Minnie M. Cook, and said Bankrupts appearing in person and by their attorney, J. Everett Brown, Esq., and said Creditor appearing by its attorney, James P. Clark, Esq., and the Trustee of said bankrupt estates, Ignatius F. Parker, appearing in person, and it having been stipulated in open Court that the above bankruptcies might be heard and tried together, and the evidence received in one might be considered in the other: and the respective parties having submitted their proofs, both oral and documentary, and said matters having been argued and briefed, and submitted for decision, and the Referee having decided the same and made and filed his Findings of Fact and [48] Conclusions of Law, Now in accordance therewith and with the law,

It Is Ordered And Adjudged, that the objections and exceptions of the Creditor, Master Lubricants Company, a corporation, be and hereby are over-ruled and said Trustees Report approved and allowed: And that the Homestead of the Bankrupts, declared on jointly held property, did not become abandoned by reason of the divorce between the bankrupts.

Dated this 31st day of December, 1945.

HUGH L. DICKSON,
Referee in Bankruptcy.

Approved as to form:

J. EVERETT BROWN,
Attorney for Bankrupts.

JAMES P. CLARK,
Attorney for creditor, Master Lubricants Company, a corporation.

Dated December 28, 1945.

[Endorsed]: Filed Dec. 31, 1945. Hugh L. Dickson, Referee.

[Endorsed]: Filed Feb. 7, 1946. [49]

[Title of District Court and Cause.]

In Bankruptcy No. 43,317-Y and No. 43,318-Y.

PETITION FOR REVIEW OF REFEREE'S ORDER BY JUDGE.

To Hugh L. Dickson, Referee In Bankruptcy:

Comes now the Petitioner, Master Lubricants Company, a corporation, a Creditor of the above named b*ak*rupts, and presents:

1. That your Petitioner is a Creditor of the above named Bankrupts, George O. Cook and Minnie M. Cook, on an allowed claim for balance of judgment, in the sum of $2777.16.

2. That on the 13th day of June, 1944, each of said Bankrupts, filed their petitions in bankruptcy, herein, with Schedules attached and each of said Bankrupts claimed certain real property to be exempt from claims of creditors, by virtue of a homestead theretofore recorded in the office of the County Recorder of Los Angeles County, California, in which said county said real property is situated, and which is particularly described as follows:

"The East 40 feet of the South 135 feet of Lot 7, of Sunnyside Heights, as per map recorded in Book 8, at page 88 of Maps, in the [50] office of the County Recorder of Los Angeles County, State of California.

3. That at the first meeting of the Creditors of said bankrupts, on July 11th, 1944, Ignatius F. Parker, was appointed Trustee in said bankruptcies and on the 17th of July, 1944, filed herein his Report of Exempted Prop-

erty, wherein the above described real property of the Bankrupts was reported as exempt and designated and set apart to be retained by the bankrupts as his or her own property, under the provisions of the acts of Congress relating to Bankruptcy.

4 That thereafter, and within the time provided by law, and the order of Referee extending time, on to wit, August 7, 1944, Petitioner, served and filed, its Objections and Exceptions to said Trustee's Report in each of said bankruptcies, as follows:

(Caption omitted)

"Exceptions and Objections by Creditor to Trustee's Report of Exempted Property.

To Hugh L. Dickson, Esq., Referee in Bankruptcy:

Comes now the Master Lubricants Company, a corporation, a creditor of the above named bankrupt, and objects and excepts to the Report of the Trustee herein, reporting as exempt by state laws, certain real property, therein described, by reason of Declaration of Homestead thereon, recorded June 22, 1940 in Book 17599, at page 120 of Official Records in the office of the County Recorder of Los Angeles, State of California, which said real property is situated in the City of Los Angeles, County of Los Angeles, State of California, and particularly described as follows, to wit:

The east 40 feet of the south 135 feet of Lot 7 of Sunnyside Heights, as per map recorded in Book 8, page 88 of Maps in the Office of the County Recorder of Los Angeles County, State of California,— [51]

Upon the following grounds, to wit:

1 That at the date of the recording of said homestead, the said bankrupt, Minnie M. Cook and her husband, George O. Cook, were and now are joint owners of the above described property.

2 That shortly after the recording of said homestead, as above set forth, and on November 15, 1941, the husband of this bankrupt, Minnie M. Cook, to wit, George O. Cook, separated from and deserted his said wife, Minnie M. Cook, and removed from said homestead property.

3 That in the forepart of June, 1942, the bankrupt herein, commenced an action for divorce from her said husband, George O. Cook, in the Superior Court of the County of Los Angeles, State of California. That summons and complaint in said action were duly served upon the defendant in said action, the said George O. Cook: that said defendant did not appear in said action but made default and his default was duly and regularly entered therein. That the complaint in said divorce action did not mention any real property as belonging to said parties or either of them and did not mention and did not claim that there was a homestead thereon and did not claim any homestead rights.

4 That thereafter and on to wit, June 30th, 1942, an Interlocutory Decree of Divorce was made and entered in said action in favor of the plaintiff therein, the bankrupt herein. That no real property was set out or described in said Interlocutory Decree, as belonging to the parties therein, and did not mention and did not make any disposition of the homestead hereinabove referred to and set out in Trustee's Report on exemptions.

5 That thereafter and on to wit, July 1, 1943, a final decree of divorce was made and entered in said action, and the same did not describe, mention or set forth description of any real property as belonging to the parties to said divorce action and did not mention the homestead claimed to be exempt in said Trustee's Report, and did not make any disposition of said homestead.

6. That on or about the 1st day of July, 1943, said homestead set [52] forth and referred to in said Trustee's Report as exempt, became and was abandoned by both the bankrupt, Minnie M. Cook, and her said husband George O. Cook, and that at the time of the filing of bankrupt's petition herein, June 13, 1944, said homestead had ceased to exist, and the bankrupt, Minnie M. Cook, and her former husband, George O. Cook, owned said property as joint tenants and not otherwise, and that said real property hereinabove and in said Trustee's Report described is now a part of the assets of the said bankrupt's estate, and should be applied to the payment of her debts.

7 That this objecting creditor, Master Lubricants Company, a corporation, heretofore and on or about September 17, 1941, in an action in the Superior Court of the County of Los Angeles, State of California, had and obtained a judgment against Minnie M. Cook, the bankrupt and George O. Cook, her husband for $3431.19 and $12.25 costs, which said judgment was entered September 17, 1941, in judgment Book 1185, page 228, of the Records of the County Clerk of Los Angeles County, California. That partial satisfactions have been made on said judgment and at the date of the filing of petition of bankrupt herein, there was still unpaid on said judg-

ment the sum of $2777.16, for which amount claim has been heretofore filed herein.

Wherefore the Master Lubricants Company, a corporation, a creditor herein, prays that these objections and exceptions be sustained and allowed and that the Report of the Trustee, as far as it exempts the real property therein and hereinabove described, as being exempt under the homestead thereon claimed by bankrupt, be disapproved and rejected and that it be found that said real property is part of the assets of the bankrupt, Minnie M. Cook, to be used and applied on debts of bankrupt, owing to creditors, and costs.

James P. Clark,

Attorney for Master Lubricants Company, a corporation, a creditor"

(Duly verified) [53]

5 That said Objections and Exceptions to Trustee's Report, was thereafter heard by Hon. Hugh L. Dickson, Referee in Bankruptcy, pursuant to due notice, on September 28th and October 5th, 1944, and upon stipulation in open Court, both bankruptcy matters were tried and considered together, and the respective parties having submitted their proofs, both oral and documentary, and the said matter having been argued and submitted and decided by said Referee, and he thereafter and on December 31, 1945, made and filed written findings of fact and conclusions of law, and did on the same date make, file and

enter an order pursuant thereto, which said order is as follows,—

"J. Everett Brown,
319 Wilcox Building,
Los Angeles, 12, California,
Mu 5929,
Attorney for Bankrupts.

In The District Court Of The United States
For The Southern District Of California
Central Division.

In Bankruptcy No. 43,317-Y and No. 43,318-Y

In the Matters of George O. Cook and Minnie M. Cook, Bankrupts.

Order over-ruling objections and exceptions of Creditor to Report of Trustee allowing exemptions of Bankrupts and approving and affirming Report.

This matter came on for hearing, pursuant to notice, before the Honorable Hugh L. Dickson, Referee in Bankruptcy, on September 28th, and by continuance, on October 5th, 1944, on Objections and Exceptions of Creditor, Master Lubricants Company, a corporation, to the Trustee's Report of exempted property of the Bankrupts, George O. Cook and Minnie M. Cook, and said Bankrupts appearing in person and by their attorney, J. Everett Brown, Esq., and said Creditor appearing by its attorney, James P. Clark, Esq., and the Trustee of said bankrupt estates, Ignatius F. Parker, appearing in person, and it

having been stipulated in open Court that the above bankruptcies might be heard and tried together, [54] and the evidence received in one might be considered in the other; and the respective parties having submitted their proofs, both oral and documentary, and said matters having been argued and briefed, and submitted for decision, and the Referee having decided the same and made and filed his Findings of Fact and Conclusions of Law, Now in accordance therewith, and with the law,

It Is Ordered And Adjudged, that the objections and exceptions of the Creditor, Master Lubricants Company, a corporation, be and hereby are over-ruled and said Trustee's Report approved and allowed;

And that the homestead of the Bankrupts, declared on jointly held property, did not become abandoned by reason of the divorce between the Bankrupts.

Dated this 31st day of December, 1945.

Hugh L. Dickson
Referee in Bankruptcy.

Approved as to form:

J. Everett Brown,
Attorney for Bankrupts.
James P. Clark,
Attorney for creditor, Master Lubricants Company, a corporation.

Dated December 28, 1945."

6 That said order is erroneous and should be set aside for the following reasons:

(a) That the same is not supported by the Findings of Facts and is contrary thereto.

(b) That the same is contrary to the evidence showing an abandonment of the homestead in the divorce proceedings between the bankrupts.

(c) That the same is contrary to law.

(d) That the Findings of Fact show an abandonment of the homestead by removal and absence therefrom, by both bankrupts.

(e) That the bankrupt, George O. Cook, abandoned his wife, Minnie M. Cook, and the homestead November 15, 1941, and did not return to the homestead until March 1943; and the bankrupt [55] Minnie M. Cook, left the homestead, in March, 1943, and shortly before her former husband moved back thereto, and has not resided thereat at any time since, as shown by the Findings of Fact.

(f) That shortly after July 1, 1943, the bankrupt George O. Cook re-married and at the time of the trial of this matter was living thereat with his second wife only, and the second wife is not shown to have any homestead rights in the property involved, as shown by the Findings of Fact.

(g) That the evidence and the facts as found show that the property in question is jointly owned by the bankrupts, at all times since acquired in 1938, and that

the homestead became abandoned prior the time of the filing of the petitions in bankruptcy herein.

Wherefore your Petitioner prays that a writ of review be granted and for a review of said order by the Judge of the said United States District Court, and that said order be vacated and set aside and the Referee directed to sustain the objections and exceptions to the Report of the Trustee, and to declare the homestead property subject to the payment of creditors of said Bankrupts; and for such other and further orders as may be proper in the premises.

Dated February 1st, 1946.

MASTER LUBRICANTS COMPANY, a corporation,

By WILLIAM L. HAGENBAUGH, President.

JAMES P| CLARK,

Attorney for Petitioner.

[Verified.]

[Endorsed]: Filed Feb. 1, 1946. Hugh L. Dickson, Referee.

[Endorsed]: Filed Feb. 7, 1946. [56]

[OBJECTING CREDITOR'S EXHIBIT 1.]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. D221735

Minnie Marie Cook, Plaintiff, vs. George Oscar Cook, Defendant.

COMPLAINT FOR DIVORCE

Plaintiff complains and alleges:

I.

That the plaintiff herein is and has been a resident of the State of California for more than one year last past and of the County of Los Angeles for more than three months immediately preceding the commencement of this action.

II.

Plaintiff alleges for the statistical purposes required by section 426a of the Code of Civil Procedure of the State of California the following facts to wit:

1. That plaintiff and defendant intermarried at Los Angeles, California.

2. That the date of marriage was on or about the 26th day of August, 1922.

3. That the date of separation was on or about the 15th day of November 1941. [57]

4. That the time from marriage to separation was nineteen years, two months and twenty days.

5. That there are three children, the issue of this marriage, to wit: Fred William Cook age nineteen, George

Ernest Cook age seventeen and Lila Lorine Cook age sixteen.

III.

That there is no community property.

IV.

That during the married life of the parties hereto the defendant has inflicted upon plaintiff a course of conduct amounting to extreme cruelty.

V.

That said extreme cruelty on the part of the defendant was not caused or provoked by plaintiff and was at all times against her will and without her consent.

VI.

That said extreme cruelty on the part of the defendant has caused plaintiff great and grievous mental and physical suffering.

VII.

That the defendant George Oscar Cook is an able bodied man able to earn sufficient money to support his wife and children. That the one son Fred William Cook age nineteen is in the United States Army. That the son George Ernest Cook age seventeen and daughter Lila Lorine Cook age sixteen are residing with the plaintiff herein and attend school. That the plaintiff herein is not employed, that she has no means of support other than such moneys that are contributed to her by the defendant herein; nor does the plaintiff have any moneys to employ an attorney and prosecute this action.

Wherefore, Plaintiff prays judgment that the bonds of matrimony between the plaintiff and defendant be dissolved. That the plaintiff be awarded the care and custody of the minor children hereto. [58] That the defendant be required to pay plaintiff a reasonable sum for the support of herself and two minor children, and a reasonable sum of money for attorney's fees in this action for costs of suit and for such other and further relief as to the Court may seem meet and proper.

ROY C. KAISER,
Roy C. Kaiser,
Attorney for Plaintiff. [59]

In this action the Defendant George Oscar Cook having been regularly served with process, and having failed to appear and answer the plaintiff's complaint, on file herein, and the time allowed by law for answering having expired, the default of said defendant, in the premises is hereby duly entered according to law.

Attest: My hand and the seal of the Court this 16 day of Jun 1942.

J. F. MORONEY, County Clerk.
By H. E. Stevens, Deputy.

[Verified.]

[Endorsed]: Filed May 29, 1942, 10:22 A. M. J. F. Moroney, County Clerk; by M. Enfield, Deputy. [60]

[Title of Superior Court and Cause.]

No. D221735

Action brought in the Superior Court of the County of Los Angeles, and.....Complaint filed in the Office of the Clerk of the Superior Court of said County.

SUMMONS

The People of the State of California Send Greetings To: George Oscar Cook, Defendant.

You are directed to appear in an action brought against you by the above named plaintiff in the Superior Court of the State of California, in and for the County of Los Angeles, and to answer the.....Complaint therein within ten days after the service on you of this Summons, if served within the County of Los Angeles, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the.....Complaint, as arising upon contract, or will apply to the Court for any other relief demanded in the.....Complaint.

Given under my hand and seal of the Superior Court of the County of Los Angeles, State of California, this 29th day of May, 1942.

J. F. MORONEY,

County Clerk and Clerk of the Superior Court of the State of California, in and for the County of Los Angeles.

By M. Enfield, Deputy.

(Seal Superior Court
Los Angeles County)

Appearance: "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." (Sec. 1014, C. C. P.)

Answers or demurrers must be in writing, in form pursuant to rule of court, accompanied with the necessary fee, and filed with the Clerk. [61]

[Affidavit of Service.]

[Endorsed]: Filed Jun. 16, 1942. [62]

[Title of Superior Court and Cause.]

No. D221735

REQUEST FOR ENTRY OF DEFAULT

To the Clerk of Said Court:

The defendant George Oscar Cook having been regularly served with process, and having failed to appear and answer the plaintiff's complaint on file herein, and the time allowed by law for answering having expired, application is hereby made that you enter the default of said defendant, herein according to law.

Roy C. Kaiser,
Attorney for Plaintiff.

Dated the 16 day of June, 1942.

[Endorsed]: Filed Jun. 16, 1942. [63]

[Title of Superior Court and Cause.]

No. D221735

AFFIDAVIT

State of California, County of Los Angeles—ss.

Minnie Marie Cook, being first duly sworn, *depose* and *say*:

That I am the plaintiff in the above entitled action.

That I personally ~~do not know~~ know the defendant.

(Strike out inappropriate words)

That I have known defendant approximately 20 years

That the present known address of defendant is 9659 S. Alameda, Los Angeles, Calif.

That the occupation of defendant is Salesman.

That the name of defendant's employer is Self.

That I last saw the defendant on 27 day of June, 1942.

That the approximate age of the defendant is 40 years.

That I know of my own knowledge that said defendant is not in the Federal Service on active duty (a) As a member of the Army of the United States, or the United States Navy, or the Marine Corps, or the Coast Guard, or as an officer of the Public Health Service detailed by proper authority for duty either with the Army or the Navy, or (b) In training or being educated under the supervision of the United States preliminary to induction into the Military Service.

Minnie Marie Cook.
Signature of Affiant.

Subscribed and Sworn to before me, on June 30, 1942.

(Seal) Roy C. Kaiser,

Notary Public in and for the County of Los Angeles, State of California.

Note: It is not necessary that Every question be answered. Affiant may answer such questions as he is able and allege any additional facts (which may, if necessary, be set forth on an attached sheet) showing that defendant is not in military service.

[Endorsed]: Filed Jun. 30, 1942. [64]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. D221735

Minnie Marie Cook, Plaintiff, vs. George Oscar Cook, Defendant.

INTERLOCUTORY JUDGMENT OF DIVORCE
(Default)

This cause came on to be heard before Honorable Samuel R. Blake, Judge presiding in Department 10, on the 30th day of June, 1942, Roy C. Kaiser appearing as attorney for plaintiff, and it appearing that defendant was duly served with process and has not appeared or answered the complaint, and that the default of defendant has been entered; and evidence having been introduced on the part of plaintiff, and said cause having been duly submitted to the Court for decision:

It Is Adjudged that plaintiff is entitled to a divorce from defendant; that when one year shall have expired after the entry of this interlocutory judgment a final judg-

ment dissolving the marriage between plaintiff and defendant be entered, and at that time the Court shall grant such other and further relief as may be necessary to complete disposition of this action.

The care custody and control of the three minor children of the parties hereto is hereby awarded to the plaintiff herein. The defendant is hereby ordered to pay to plaintiff herein, the sum of $16.00 per week for the care and

[MacG]

maintenance of plaintiff and ~~minor~~ ~~children,~~ ~~payable~~ ~~each week~~ ~~beginning~~ ~~as~~ ~~of~~ ~~June~~ ~~29,~~ ~~1942~~ two of the minor children, George Ernest Cook and Lila Lorine Cook, payable each week commencing as of June 29, 1942. Defendant is allowed visitations.

Done in open Court this 30th day of June, 1942.

Samuel R. Blake

.....

Judge.

Notice—Caution. This is not a Judgment of Divorce. The parties are still husband and wife, and will be such until a final Judgment of Divorce is entered after one year from the entry of this Interlocutory Judgment. The final Judgment will not be entered unless requested by one of the parties.

Entered Jun. 30, 1942. Docketed Jul. 1, 1942, Book 1262, page 17, by M. Valenzuela, Deputy.

[Endorsed]: Filed Jun. 30, 1942. [65]

AGREEMENT

This Agreement made and entered into this 29th day of June, 1942, by and between George Oscar Cook of the City of Los Angeles, County of Los Angeles, State of California, herein called the party of the first part, and Minnie Marie Cook, his wife, of the same place, herein called the party of the second part,

Witnesseth:

That the parties hereto are now husband and wife; and Whereas unhappy differences have arisen and do now exist between them; and,

Whereas the parties hereto are now desirous of making settlement out of Court of the property rights as well as a settlement of all expenses, alimony and attorney's fees;

Now Therefor, in consideration of the mutual covenants on the part of the parties hereto and for the purpose of settling all claims of the parties hereto, the said party of the second part agrees to release all of her interest in and to any property that the party of the first part may hereafter accumulate.

It Is Further Understood and agreed that the party of the first part shall pay to the party of the second part for the support of herself and the minor children of the parties hereto, the sum of Sixteen Dollars ($16.00) per week, beginning June 29, 1942.

That the party of the first part pay to Roy C. Kaiser Attorney for the party of the second part, the sum of One hundred dollars ($100.00). [66]

That the said party of the second part shall have the household furniture and furnishings and same shall constitute her sole and separate property.

Said party of the first part hereby waives, releases and relinquishes all rights, claims and obligations of any character which he may have against the party of the second part and waives, releases and relinquishes any claims he may have in and to any property that the party of the second part may have or acquire hereafter in which he may have or claim to have an interest by reason of the marital relationship existing between them. Said party of the first part waives all right or claims of inheritance from the estate of the party of the second part and all rights to administer the same.

Said party of the second part hereby waives, releases and relinquishes all rights, claims and obligations of any kind or character which she may have against the said party of the first part and waives, releases and relinquishes any claims that she may have or claim to have an interest by reason of the marital relationship existing between them.

Said party of the second part waives any right or claims of inheritance from the estate of the said party of the first part and all rights to administer the same.

In Consideration Of The Foregoing the said party of the second part hereby agrees to accept said furniture and furnishings and other payments of money as aforesaid

in full of any claim or right that she may have to support, alimony or attorney's fees.

It Is Further Understood and agreed by and between [67] the parties hereto that in any action that may be pending or in any action that hereafter may be instituted by either of the parties hereto, either for divorce, separate maintenance or otherwise the Court may make and order conforming to the terms of this agreement.

It Is Further Agreed by and between the parties hereto and they hereby agree to execute and accept any and all necessary papers, deeds, assignments or documents to pass title in accordance with this agreement.

In Witness Whereof the parties hereto set their names and seals the day and year first above written.

GEORGE OSCAR COOK
Party of the First part.

MINNIE MARIE COOK
Minnie M. Cook
Party of the Second part. [68]

[Certificate of Notary.]

Case No. D221735. Plff. Exhibit One. Filed Jun. 30, 1942. J. F. Moroney, County Clerk; by J. MacGregor, Deputy. [69]

In the Superior Court of the State of California
in and for the County of Los Angeles

No. D221735

Minnie Marie Cook, Plaintiff, vs. George Oscar Cook, Defendant.

FINAL JUDGMENT OF DIVORCE

In this cause an interlocutory judgment was entered on the 30 day of June, 1942, adjudging that plaintiff was entitled to a divorce from defendant, and more than one year having elapsed, and no appeal having been taken from said judgment, and no motion for a new trial having been granted and the action not having been dismissed;

Now, upon the Court's own motion, it is adjudged that plaintiff be and is granted a final judgment of divorce from defendant and that the bonds of matrimony between plaintiff and defendant be, and the same are, dissolved.

It is further ordered and adjudged that wherein said interlocutory judgment makes any provision for alimony or the custody and support of children, said provision be and the same is hereby made binding on the parties affected thereby the same as if herein set forth in full, and that wherein said interlocutory judgment relates to the property of the parties hereto, said property be and the same is hereby assigned in accordance with the terms thereof to the parties therein declared to be entitled thereto.

Done in open Court this 1st day of July, 1943.

WM. S. BAIRD, Judge.

Filed at request of Minnie Marie Cook.

(Strike out two and sign in ink—
~~Attorney~~ Plaintiff ~~Defendant~~)

Address 5515½ S. Broadway Apt #2
Los Angeles, Calif.

This Judgment is not effective until entered in Judgment Book by Clerk

Entered Jul. 1, 1943. Docketed Jul. 2, 1943, Book 1343, page 175, by N. Rosenblatt, deputy.

[Endorsed]: Filed Jul. 1, 1943.

MINNIE MARIE COOK vs GEORGE OSCAR COOK,

No. D 221735

State of California, County of Los Angeles—ss.

I, J. F. Moroney, County Clerk and ex-officio Clerk of the Superior Court within and for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original Complaint for Divorce, filed May 29th, 1942; Summons, filed June 16th, 1942; Request for Entry of Default, filed June 16th, 1942; omitting Setting Card, dated June 16th, 1942; Affidavit, filed June 30th, 1942, Interlocutory Judgment of Divorce, filed June 30th, 1942; and thereafter entered June 30th, 1942,

in Book 1262, at Page 17 of Judgments; Copy of Plaintiff's Exhibit One (Copy of Agreement) filed June 30th, 1942; and Final Judgment of Divorce, filed July 1st, 1943; and thereafter entered July 1st, 1943, in Book 1343, at Page 175 of Judgments, on file and/or of record in my office, and that I have carefully compared the same with the original.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Superior Court this 18th day of September 1944.

(Seal) J. F. MORONEY, County Clerk.

By Lulu G. Morris, Deputy.

[Endorsed]: No. 43317-Y & 43318-Y. Re: George O. Cook, Bankrupt; Minnie M. Cook, Bankrupt. Obj. Cred. Exhibit No. 1. Filed 9-28-44. Hugh L. Dickson, Referee. [70]

In the District Court of the United States
For the Southern District of California
Central Division

In Bankruptcy No. 43,317-Y and No. 43,318-Y.

In the Matters of

GEORGE O. COOK
and
MINNIE M. COOK

Bankrupts.

REFEREE'S CERTIFICATE ON REVIEW

To The Honorable Leon R. Yankwich, Judge of the District Court of the United States, Southern District of California, Central Division:

I, HUGH L. DICKSON, one of the referees of the above Court, do hereby certify that in the course of the proceedings in the above entitled matters, before me, upon hearings of the Objections and Exceptions of the Master Lubricants Company, a corporation, to Trustee's Report of Exempted Property, setting aside certain real property for the Bankrupts, as exempted under the homestead law of the State of California, which said Objections and Exceptions were verified and filed within time, the following questions were presented:

(a) Where the Bankrupts, then husband and wife, acquired the real property in question, as joint tenants, by deed recorded June 24, 1939, and thereafter filed and recorded a Declaration of [71] Homestead thereon June 22, 1940, all in the County of Los Angeles, State of California, wherein said property is situated, and thereafter and on November 15, 1941, the husband, George O. Cook,

left the homestead and deserted his wife, the said Minnie M. Cook, and took up his residence elsewhere; and thereafter and on May 29, 1942, the wife commenced an action for divorce from her said husband; that the said husband was duly served with summons and complaint, but made no answer and suffered his default to be entered, and that thereafter and on June 30, 1942 an Interlocutory Decree of Divorce was made and entered, and on July 1, 1943, a final Decree of Divorce was made and entered in said action; and neither in the complaint in said action, the Interlocutory Decree nor the Final Decree, is the Homestead or rights of the parties therein, or the real property covered by said Homestead, mentioned or in any way disposed of, was there an abandonment of the Homestead by the former husband and wife, the bankrupts herein?

(b) Where it is shown that the wife left the homestead in March, 1943, and thereupon the husband returned to the homestead in March, 1943 and continued to live thereat, up to the time of the filing of the bankruptcy petitions herein June 13, 1944, and thereafter up to the time of the hearings of said Objections and Exceptions of Creditor, September 28 and October 5, 1944, would this have any effect on the question of abandonment, and, if so, what?

(c) Where it is shown that when the husband returned to the Homestead in March 1943, a minor daughter of the Bankrupts lived thereat with him, up until shortly prior to September 28, 1944, and that shortly after the entry of the Final Decree of Divorce, July 1, 1943, the husband remarried and his second wife lived with him on the Homestead, what if any effect did these facts have on the question of abandonment of the homestead? Did

the fact of the residence of the minor child with the father on [72] the homestead prevent an abandonment in law, under the conditions of the pleading and decrees in the divorce action, or did the residing of the second wife thereat with the husband have any effect in the continuance of the homestead?

(d) Where it is shown that the wife, Minnie M. Cook, left the homestead in March, 1943 and has never lived thereat since, is there an abandonment by her of the homestead, under the conditions of the pleading and decrees in the divorce action?

Hearing of evidence and arguments of law were heard on September 28, 1944 and October 5, 1944 and matter submitted, and thereafter and on December 31, 1945, I made and filed written Findings of Fact and Conclusions of law, hereunto annexed, and on December 31, 1945, made and entered, pursuant thereto, the following order:

(Omitting caption and preamble)

"It Is Ordered And Adjudged, that the objections and exceptions of the Creditor, Master Lubricants Company, a corporation, be and hereby are overruled and said Trustee's Report approved and allowed;

"And that the Homestead of the Bankrupts, declared on jointly held property, did not become abandoned by reason of the divorce between the bankrupts.

Dated this 31st day of December, 1945.

HUGH L. DICKSON
Referee in Bankruptcy.

Approved as to form:

J. Everett Brown,
attorney for bankrupts.

James P. Clark,
attorney for creditor, Master
Lubricants Company, a corporation.

Dated December 28, 1945."

And that thereafter and on the 1st day of February, 1946, and within time provided by law and extension of time granted, the [73] Creditor, Master Lubricants Company, a corporation, served and filed its Petition for a review of said order by the Judge.

Attached to this Certificate are the following documents:

1. Trustee's Reports of Exempted Property (George O. Cook and Minnie M. Cook estates).
2. Exceptions and O*jb*ections by Creditor thereto (George O. Cook and Minnie M. Cook estates).
3. Memorandum Opinion on Objections to Reports of Exempted Property.
4. Findings of Fact and Conclusions of Law.
5. Order pursuant thereto.
6. Petition for Review of Referee's order by Judge.
7. Reporter's Transcript of Evidence.
8. All exhibits offered and received in evidence (1 to 5 inclusive).

Dated: This 7th day of February, 1946.

HUGH L. DICKSON
Referee in Bankruptcy.

[Endorsed]: Filed Feb. 7, 1946. [74]

In the District Court of the United States
For the Southern District of California,
Central Division.

No. 43317-Y, No. 43318-Y.

In the Matter of

GEORGE O. COOK,

Bankrupt,

and

MINNIE M. COOK,

Bankrupt.

ORDER AFFIRMING ORDER OF REFEREE.

The Master Lubricants Company, a Corporation, having filed its Petition for Review of the Order of Referee Hugh L. Dickson dated December 31st, 1945, and the said matter coming on duly to be heard before the undersigned, Judge of the United States District Court, on April 1st, 1946 at 2:00 o'clock P. M., the said Master Lubricants Company, a Corporation, appearing by James P. Clark, Esq., its Attorney, and the said George O. Cook and Minnie M. Cook, appearing by George Gardner, Esq., their Attorney and the Court having considered the matter and having heard the arguments of counsel, and being full advised in the premises, good cause appearing,

It Is Ordered That the Petition of said objecting creditor, Master Lubricants Company, a Corporation, be and the same is hereby denied and said Order of Referee Hugh L. Dickson [75] dated December 31st, 1945, over-

ruling the objections and exceptions of the said Creditor, Master Lubricants Company, a Corporation, to the report of Trustee allowing exemptions of Bankrupts, and approving and affirming Report, be and the same is hereby affirmed.

Dated: April 5th, 1946.

LEON R. YANKWICH
Judge of the United States District Court.

Approved as to form:

James P. Clark
Attorney for Master Lubricants
Company, a Corporation, Petitioner.

Presented by:

George Gardner
Atty. for George O. Cook and
Minnie M. Cook.

Judgment entered Apr. 5, 1946. Docketed Apr. 5, 1946, C. O. Book 37, Page 589. Edmund L. Smith, Clerk; By John A. Childress, Deputy.

Notation made in Bankruptcy Docket on 4/5/46 pursuant to Rule 79(a), Civil Rules of Procedure.

John A. Childress,
Deputy Clerk.

[Endorsed]: Filed Apr. 5, 1946. [76]

[Title of District Court and Cause.]

No. 43317-Y, No. 43318-Y.

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS.

Notice Is Hereby Given that Master Lubricants Company, a corporation, a creditor of the above named Bankrupts, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain order and judgment, made and entered in the above entitled matters, on the 5th day of April, 1946, in the above United States District Court, denying the Petition of said creditor for a review of and affirming that certain order made and entered by Hugh L. Dickson, Esq., Referee in Bankruptcy, on December 31, 1945, overruling exceptions and objections of said creditor to the Trustee's Report of Exempted Property, allowing as exempt to said Bankrupts certain real property, on which Bankrupts claimed a homestead, approving said Report, and adjudging that said homestead did not become abandoned by reason of a divorce between said Bankrupts.

Dated this April 3, 1946.

JAMES P. CLARK
Attorney for Appellant.

[Endorsed]: Filed and mld copy to George Gardner, Atty. for Bkpts., May 3, 1946. [77]

[Title of the District Court and Cause.]

No. 43317-Y, No. 43318-Y.

UNDERTAKING FOR COSTS ON APPEAL

Know All Men By These Presents:

That the United States Fidelity and Guaranty Company of Maryland, a corporation organized and existing under the laws of the State of Maryland, and duly licensed to transact business in the State of California, is held and firmly bound unto George O. Cook and Minnie M. Cook, bankrupts in the above entitled matter, in the plenary sum of Two Hundred Fifty ($250.00) Dollars, to be paid said bankrupts, their heirs and assigns; for which payments, well and truly to be made, the United States Fidelity and Guaranty Company, a corporation, binds itself, its successors and assigns, firmly by these presents.

The condition of the above obligation is such that, whereas Master Lubricants Company, a corporation, a creditor, the petitioner in said matter, is about to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from a certain order and judgment made and filed on the 5th day of April, 1946, denying the petition of said petitioner for a review of and affirming that certain order made and entered by Hugh L. Dickson, Esq., Referee in Bankruptcy, on December 31st, 1945, overruling exceptions and objections of said creditor to the Trustee's Report of Exempted Property, allowing as exempt to said Bankrupts certain real property, on which Bankrupts claimed a homestead, approving said Report, and adjudging that said homestead did not become aban-

doned by reason of a divorce between said Bankrupts, and which said order and judgment was made by the United States District Court, Southern District of California, Central Division, in the above entitled matter:

Now Therefore, If the appellant shall prosecute said appeal to effect [78] and answer all costs which may be adjudged against it if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award if the order and judgment is modified, then this obligation shall be void; otherwise, to remain in full force and effect.

It Is Hereby Agreed by the surety that in the case of default or contumacy on the part of the principal or surety, the Court may, upon notice of not less than ten days, proceed summarily and render judgment against them, or either of them, in accordance with their obligation and award execution thereon.

Signed and Sealed, and dated this 3rd day of May, 1946.

Master Lubricants Company, a corporation,
By Wm. L. Hagenbaugh, President
Principal

UNITED STATES FIDELITY AND GUARANTY COMPANY
By O. D. Brick,
Attorney-in-Fact.

(Seal)

Examined and recommended for approval as provided in Rule 13.

James P. Clark
Attorney.

The Premium on this Bond is $10.00 for 1 year.

I hereby approve the foregoing.

Dated this ..... day of ....., 1946.

.....,

Judge.

State of California, County of Los Angeles—ss:

On this 3rd day of May in the year one thousand nine hundred and forty-six, before me, Elizabeth A. Sheridan, a Notary Public in and for said County and State, residing therein, duly commissioned and sworn, personally appeared O. D. Brick, known to me to be the duly authorized Attorney-in-fact of the United States Fidelity and Guaranty Company, and the same person whose name is subscribed to the within instrument as the Attorney-in-fact of said Company and the said O. D. Brick duly acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

Elizabeth A. Sheridan (Seal)
Notary Public in and for Los Angeles County,
State of California.

My Commission Expires Nov. 5, 1948.

[Endorsed]: Filed May 3, 1946. [79]

[Title of District Court and Cause.]

In Bankruptcy No. 43,317-Y and No. 43,318-Y.

DESIGNATION BY APPELLANT OF POINTS ON WHICH IT INTENDS TO RELY ON APPEAL.

Master Lubricants Company, a corporation, Appellant, under the appropriate rule governing procedure on appeal, makes this statement and designation of the points on which Appellant intends to rely on this appeal from the judgment and order of the above entitled United States District Court, made and filed herein April 5, 1946, as follows, to wit:

(1) The Bankrupts, George O. Cook and Minnie M. Cook were formerly husband and wife, and as such acquired in point tenancy certain real property in the City of Los Angeles, County of Los Angeles, State of California, particularly described as, the East 40 feet of the South 135 feet of Lot 7 of Sunnyside Heights, as per map recorded in Book 8, Page 88 of Maps in the office of the County Recorder of Los Angeles County, State of California. Deed for which was recorded June 24, 1939. Declaration of homestead, executed by both of bankrupts, then husband and wife, was recorded in the office of the Recorder of Los Angeles County, on June 22, 1940, covering above property.

(2) That on September 17, 1941, in the Superior Court of the State [80] of California, in and for the County of Los Angeles, judgment was entered in favor of Master Lubricants Company, a corporation, the Appellant and against George O. Cook and Minnie M. Cook, his wife, the Bankrupts, for $3431.19 and $12.25 costs;

that partial satisfaction of said judgment was made in 1942, and on date of filing of Petitions in bankruptcy by said Bankrupts, June 13, 1944, there was unpaid on said judgment a balance of $2777.16, for which claim was filed in said bankruptcy and allowed by the Referee.

(3) That on November 15, 1941 the said George O. Cook left the homestead and abandoned and deserted his wife, Minnie M. Cook, who continued to live at the homestead, with her daughter, Lila Lorine Cook, until March, 1943. On May 29, 1942, the wife filed an action for divorce against her said husband, in the Superior Court of Los Angeles County, California and for alimony; the defendant was duly served, but did not answer or make any appearance, and his default was entered. The complaint in that action did not describe or claim that the parties owned any real property and did not mention the homestead.

(4) That on June 30th, 1942, an Interlocutory Decree of divorce was granted the plaintiff, with custody of her three children and ordering defendant, the husband, to pay $16.00 a week for the care and maintenance of plaintiff and her minor children. That no mention is made of the real property or homestead of the parties. No appeal was taken from this decree and it became final as to the right to a divorce and all property matters affected by it, after the expiration of the time allowed by law for such appeal.

(5) On July 1, 1943 a final decree of divorce was made and entered in said action and the final decree did not set forth or refer to any real property belonging to the parties and made no mention of or disposition of the homestead.

(6) That upon the entry of the final decree of divorce both husband and wife were restored to their former status as single [81] persons, and as the homestead was not mentioned in and was not disposed of in any way in the divorce action, it must be deemed to have *have* been abandoned and terminated.

(7) A written agreement was made between the parties at or about the time the divorce action was brought, meant to be a property settlement and this did not mention any real property as owned by the husband and wife, nor did it mention the homestead, but only related to personal property and attorney's fees in the action.

(8) When the wife moved away from the homestead in March, 1943, the husband, George O. Cook, moved back to the homestead and has continued to reside thereat; shortly after the entry of final decree in the divorce action, he re-married and took his second wife to live on the homestead property; but the homestead as such had become abandoned prior to that time.

(9) On June 13, 1944, the bankrupts filed separate petitions in bankruptcy, with identical Schedules of property, except that Minnie M. Cook listed an automobile worth $70.00. They each listed the property covered by the homestead and claimed that it was exempt as a homestead to each of them. These bankruptcy matters were referred to Hugh L. Dickson, Esq., Referee in Bankruptcy. A Trustee was appointed at the first meeting of the creditors by the Referee, and such Trustee filed his Report exempting all property listed, both real and

personal, and the real property as exempt as a homestead to the bankrupts. In due time Appellant served and filed as a creditor, written exceptions and objections to the Trustee's Report. These matters were heard by the Referee on September 28, 1944 and October 5th following, and it developed at the hearings that the minor daughter of the parties, Lila Lorine Cook, lived with her father on the homestead premises from March, 1943 until about a week prior to September 28, 1944, when she left the homestead property or what had been the homestead, and went to live with her mother at another place in Los ngeles, and that she has ever since lived with her mother. [82]

(10) Children, whether minor or not, have no rights in the property covered by a homestead, at time of divorce, unless conferred by statute, and there is no such statute law in California; it is only in the event of the death of a parent, that a child under the probate law is given recognition and rights in the homestead.

(11) The residing for a time by the minor daughter with her father on the property claimed by him as a homestead, after divorce, does not revive or continue the life of the homestead in the father. Nor can he draw any recognition of the homestead from the fact that he in part supported her while she lived with him, as this was a duty that the law imposed upon him.

(12) The order made and entered December 31, 1945, overruling Appellant's exceptions and objections to Trus-

tee Report, approving the Report of exemptions and adjudging that the homestead was not abandoned and terminated by the divorce between the bankrupts was erroneous and against the law, and contrary to the findings.

(13) That the order and judgment of the United States District Court, denying Appellant's Petition for a review of the Referee's order above mentioned and affirming such order of Referee was error and against law and contrary to the findings of fact of the Referee.

(14) That the evidence at the hearing before the Referee established the date of birth of the minor daughter, Lila Lorine, as of October 8, 1925 and on the coming October 8, 1946, she will be of age. That this minor left the homestead premises prior to September 28, 1944 and has not since resided thereat. That at the time of the filing of the bankruptcy petitions herein, George O. Cook and Minnie M. Cook, owned the real property formerly covered by said homestead as joint tenants and not otherwise; that this real property was then and is now an asset of said bankrupts subject to the payment of their debts, and should be so applied.

JAMES P. CLARK
Attorney for Appellant.

Dated May 9, 1946. [83]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 9, 1946. at 3 P. M. [84]

[Title of District Court and Cause.]

In Bankruptcy No. 43,317-Y and No. 43,318-Y.

DESIGNATION BY APPELLANT OF PAPERS AND MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL.

Master Lubricants Company, a corporation, Appellant, under the appropriate Rule governing procedure on appeal, hereby designates the portion of the records, proceedings and evidence to be contained in the record of its appeal herein, and which are necessary for the consideration thereof, to wit:

(1) Petitions of Bankrupts, filed June 13, 1944 and including Schedules A and B thereof.

(2) Approval of Bankrupts petitions.

(3) Trustee's Report of Exempt Property of George O. Cook and Minnie M. Cook, Bankrupts.

(4) Exceptions and objections of Master Lubricants Company, a corporation, a creditor, and Appellant herein to said Trustee's Reports of exemptions of Bankrupts.

(5) Findings of Fact and Conclusion of Law of Referee, dated December 31, 1945, after hearings on objections and exception of said creditor to Trustee's Report on Exemptions.

(6) Order of Referee, dated December 31, 1945, overruling exceptions and objections to Trustee's Report of Exemptions. [85]

(7) Application and order extending time of Master Lubricants Company, a corporation, a creditor, and Appellant herein, to file petition for review of order of Referee.

(8) Petition of Appellant for review of Referee's order of December 31, 1945, overruling exceptions and objections to Trustee's Report of Exemptions, by Judge of United States District Court.

(9) Certificate of Referee on Review, dated February 7, 1946.

(10) Order of United States District Court, dated April 5, 1946, denying petition for review and affirming Referee's order of December 31, 1945.

(11) Notice of Appeal, dated May 3, 1946.

(12) Bond for costs on appeal.

(13) Reporter's Transcript of evidence taken on hearings on September 28 and October 5, 1944, before Referee, on exceptions and objections of Appellant to Trustee's Report of Exemptions of Bankrupts.

(14) Exhibit 1 offered and received in evidence on behalf of Appellant at said hearing before Referee, being photostatic copies of complaint, default, interlocutory decree, final decree and property settlement, in the divorce case of Minnie M. Cook against George O. Cook, the Bankrupts herein.

(15) Appellant's designation of points on appeal.

(16) This Designation.

JAMES P. CLARK,
Attorney for Appellant.

Dated May 9, 1946. [86]

[Affidavit of Service by Mail.]

[Endorsed]: Filed May 9, 1946, at 3 P. M. [87]

[Title of District Court and Cause.]

No. 43317-Y-Bkcy. No. 43318-Y-Bkcy.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 87 inclusive contain full, true and correct copies of Petition and Schedules in each of Cases Nos. 43317-Y and 43318-Y; Orders of Adjudication and of General Reference in each of cases Nos. 43317-Y and 43318-Y; Trustee's Report of Exempted Property in each of cases Nos. 43317-Y and 43318-Y; Exceptions and Objections by Creditor to Trustee's Report of Exempted Property in each of cases Nos. 43317Y and 43318-Y; Findings of Fact and Conclusions of Law Upon Objections of Creditor to the Trustee's Report of Exempted Property; Order Overruling Objections and Exceptions of Creditor to Report of Trustee Allowing Exemptions of Bankrupts and Approving and Affirming Report; Petition for Review of Referee's Order by Judge; Creditor's Exhibit No. 1; Referee's Certificate on Review; Order Affirming Order of Referee; Notice of Appeal; Undertaking for Costs on Appeal; Designation of Points on which Appellant Intends to Rely on Appeal and Designation by Appellant of Papers and Matters to be Included in the Record on Appeal which, together with copy of reporter's transcript of Hearings on September 28 and October 5, 1944, transmitted herewith, constitute the record on ap-

peal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $16.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 10 [88] day of June, A. D. 1946.

(Seal) EDMUND L. SMITH,
Clerk

By Theodore Hocke
Chief Deputy Clerk

In the District Court of the United States
Southern District of California
Central Division

Nos. 43,317-Y, 43,318-Y

In the Matter of

GEORGE O. COOK and MINNIE M. COOK,

Bankrupts.

HEARING ON OBJECTIONS TO DISCHARGE OF BANKRUPTS AND EXCEPTIONS AND OBJECTIONS OF CREDITOR TO TRUSTEE'S REPORT OF EXEMPTED PROPERTY

The following is a stenographic transcript of the proceedings in the above entitled cause, which came on for hearing before the Honorable Hugh L. Dickson, United States Referee in Bankruptcy, at his courtroom, 343 Federal Building, Los Angeles, California, at the hour of ten o'clock a. m., on September 28, 1944.

Appearances:

James P. Clark, Esq., appearing on behalf of the creditor, Master Lubricants Co.

J. Everett, Brown, Esq., appearing on behalf of the Bankrupts.

I. F. Parker, Esq., Trustee. [1*]

*Page numbering appearing at top of page of original Reporter's Transcript.

The Referee: Now, we come to the Cook cases, Objections to Discharge, and Objections to Trustee's report of exempted property. Maybe we had better take that up first.

Mr. Clark: Mr. Brown, we have several matters here. Will you stipulate they may be heard at the same time?

Mr. Brown: Why, certainly. I want to get through with them.

Mr. Clark: The George O. Cook and the Minnie M. Cook cases?

Mr. Brown: Yes, I will stipulate.

Mr. Clark: And that the objections to the Trustee's report of exemptions in both cases might be heard at the same time?

Mr. Brown: Why, certainly.

The Referee: They are all on the calendar for this time. Will your evidence be different in each case?

Mr. Clark: No. And that the objections to discharge of the Bankrupts might be considered at the same time?

Mr. Brown: Yes.

Mr. Clark: And that the evidence introduced in one case might be considered so far as applicable in the other case?

Mr. Brown: Certainly.

Mr. Clark: That is all. I would like to call Mrs. Cook first. [2]

MINNIE M. COOK,

one of the Bankrupts herein, called as a witness, was sworn and testified as follows:

Direct Examination.

By Mr. Clark:

Q. You are Minnie M. Cook? A. Yes, sir.

The Referee: As I remember it, you and Mr. Cook are not living together?

The Witness: No, we are divorced and he has remarried.

Mr. Clark: Q. Mrs. Cook, there has been a divorce between yourself and George O. Cook? A. Yes.

Q. When did he leave you?

Mr. Brown: Objected to as immaterial.

The Referee: I don't see what the materiality is. What difference does it make what time she left him or he left her?

Mr. Clark: I am going to come to the question of homestead, if your Honor please.

The Referee: Objection overruled. Let's get at the facts. I think it will be stipulated there is not a very kindly feeling between the parties at this time.

Mr. Clark: I don't know, your Honor. There may be a very friendly feeling between them.

Mr. Brown: I don't want to make that stipulation. [3] Let it come out.

The Referee: Divorces are so common nowadays. Maybe it is on a friendly basis.

Mr. Clark: That is particularly applicable to Hollywood, your Honor.

(Further discussion omitted.)

(Testimony of Minnie M. Cook)

Q. When did your husband leave you prior to the divorce?

A. I don't remember that time any more. In fact, I have forgotten about the whole matter.

Mr. Clark: I think as long as this is going to be largely a law question I will introduce this in evidence. I have here a transcript of the proceedings of the divorce action. I will state the purpose of introducing it to Your Honor so that it will be clear. Neither the complaint nor the interlocutory decree or the final decree or the property settlement agreement in writing mentioned the homestead and the real estate covered by it.

Mr. Brown: I will stipulate to that.

Mr. Clark: I would like to have this in the record so in case of appeal we will have it.

The Referee: All right, sir. Hand it to the reporter and he will mark it.

(The document was marked Objecting Creditor's Exhibit 1.)

Mr. Clark: Q. Where were you living at the time your [4] husband left you and which this record shows to be on November 15, 1941?

A. I was living out there on 105th Street.

Q. On what street? A. On 105th Street.

Q. On the property covered by the homestead?

A. Yes.

Mr. Clark: Mr. Brown, will you stipulate this homestead property was acquired by joint tenancy deed dated February 16, 1932, by George O. Cook and Minnie M. Cook, his wife?

(Testimony of Minnie M. Cook)

Mr. Brown: I will stipulate the deed itself is the best evidence.

Mr. Clark: Very well, then. We will offer this deed in evidence.

The Referee: It will be received. It has been recorded, I assume?

Mr. Clark: It has been recorded.

(The document was marked Objecting Creditor's Exhibit 2.)

Q. On June 20, 1940, there was a declaration of homestead filed.

Mr. Brown: The declaration of homestead is the best evidence, your Honor. I handed it to counsel and I would like to have him introduce it.

Mr. Clark: All right. If your Honor please, I offer [5] this in evidence.

The Referee: Objecting Creditor's Exhibit 3.

(The document was marked Objecting Creditor's Exhibit 3.)

Mr. Brown: Here is another deed on the same property.

Mr. Clark: I think the other one will be sufficient.

The Referee: The first deed here, Objecting Creditor's Exhibit No. 2, is dated February 6, 1939, from Nathan Buchwald and wife to George O. and Minnie M. Cook. All right, sir.

Mr. Brown: In order to keep the record straight, there have been two joint deeds executed on that property by the grantors. That is why I offered the second

(Testimony of Minnie M. Cook)

deed so there wouldn't be any argument as to which deed took conveyance.

The Referee: What was the purpose of the second deed, Mr. Brown?

Mr. Brown: To correct the legal description.

Mr. Clark: Then we will offer it in evidence.

The Referee: Creditor's Exhibit 4.

(The document was marked Objecting Creditor's Exhibit 4.)

Mr. Clark: Q. When did you move from this property at 1513 West 105th Street?

A. I believe it was a year ago in March.

Q. What year? A. A year ago in March. [6]

The Referee: That would be 1943?

The Witness: Yes.

Mr. Clark: Q. Didn't you move from that property in 1942? A. A year ago last March.

Mr. Clark: If your Honor will let me have that exhibit.

The Referee: Here are all of them.

Mr. Clark: Q. Oh, it was March, 1943.

A. It was a year ago last March.

Q. Where did you move to?

A. 5515½ South Broadway.

Q. You have been living there ever since?

A. I have.

Q. In apartment No. 2? A. That is right.

Q. Who is living with you?

Mr. Brown: That is objected to, who is living with her.

(Testimony of Minnie M. Cook)

Mr. Clark: I will show the materiality of it a little later.

The Referee: All right, sir. Objection overruled. Does the answer tend to degrade this witness?

Mr. Clark: Q. Does your daughter live with you?

A. She moved in about a week ago with me.

The Referee: Who moved in with you?

The Witness: My daughter.

The Referee: All right. [7]

Mr. Clark: Q. You left this property in March, 1943, you say, the property at 1513 West 105th Street?

A. Yes, that is right.

Q. That is the first time you moved to 5515½ South Broadway? A. That is right.

Q. Is your daughter married?

A. No, she isn't.

Q. Did your daughter move with you to 5515½ South Broadway? A. About a week ago, yes.

Q. I didn't catch your answer.

A. About a week ago.

Q. Did she move there with you when you first went there in March, 1943?

A. No, she didn't. I moved there alone.

Q. When you moved away from 1513 West 105th Street, the homestead, who lived there after you left?

Mr. Brown: Objected to as being heresay.

The Referee: She may have visited there.

Mr. Clark: She may have.

The Referee: She may know, Mr. Brown. I don't know. Let's find out.

The Witness: Well, Mr. Cook.

(Testimony of Minnie M. Cook)

The Referee: Do you know of your own knowledge who lived there? [8]

The Witness: Yes, I do.

The Referee: All right, let's have it.

The Witness: Mr. Cook and my daughter, Lila; they lived there together. When I moved out Mr. Cook moved in.

The Referee: Is this your daughter and Mr. Cook's daughter?

The Witness: Yes, it is.

Mr. Clark: Q. When you say Mrs. Cook, you mean the second Mrs. Cook? A. No, Lila, my daughter.

Q. Oh, that is the Miss Cook, isn't it?

A. Yes, that is Lila.

Q. She stayed there at the house?

A. Yes, she stayed with Mr. Cook.

Q. There was nobody else there but Mr. Cook and the daughter? A. That is right.

Q. But your daughter is living with you now?

A. She moved in with me a week ago.

Q. How is that?

A. She moved in with me a week ago.

Q. And she is living with you now?

A. Yes she is.

Q. And the people living at the old homestead are George O. Cook and his second wife

A. That is right. [9]

The Referee: As I understand you, madam, when you left this homestead property Mr. Cook and his daughter continued to reside there?

The Witness: That is right.

(Testimony of Minnie M. Cook)

The Referee: And they have resided there ever since, so far as you know?

The Witness: Yes.

The Referee: And they reside there now?

The Witness: Except my daughter. She moved in with me a week ago.

The Referee: Except your daughter moved in with you a week ago?

The Witness: Yes.

The Referee: All right.

Mr. Clark: Q. When your husband left you on November 15, 1941, where did he go?

Mr. Brown: Objected to as immaterial.

Mr. Clark: I don't think it would be, your Honor.

The Referee: I don't know, Mr. Brown. I have no pleadings pro and con. I don't know what is in the mind of either party. My practice is to hear all of the facts and disregard the immaterial. I try to find out what the true answer should be. If I had a complaint and answer here, with allegations pro and con, I would know something about it.

Mr. Brown: If the Court please, the Civil Code section [10] lays down as to how a homestead can be abandoned.

The Referee: I understand that perfectly well. There are only two ways.

Mr. Brown: Two ways, and all these questions he is asking are immaterial.

The Referee: I don't know. The courts have held a man may move away to Nevada and rent the property and still retain a homestead. We will hear all of the facts. Do you know where Mr. Cook went?

(Testimony of Minnie M. Cook)

The Witness: No, I don't.

The Referee: All right. We had that great long squabble over nothing.

Mr. Clark: Q. He left that homestead about that time, did he? A. Yes, he did.

Q. You were there residing with your daughter?

A. That is right.

Q. You said you continued to reside there up until March, 1943?

A. That is right. It was 1942. It was a year ago last March.

The Referee: This is 1944.

Mr. Clark: Yes.

Q. Do you mean to say you left there in March, 1942?

A. Well, a year ago last March, 1943.

The Referee: That would be March, 1943. [11]

Mr. Clark: Do you remember when you filed your divorce action? Was that before or after you left this homestead?

A. No. I was still there after the divorce. I was still living there after the divorce.

Q. You got the final decree July 1, 1943, is that correct? A. June 30.

Q. 1943? A. That is right.

Q. Now, between the time that George O. Cook left that place in November, 1941, and the time you got your final decree of divorce in 1943, was he at the homestead or away from it? A. He was away from it.

Q. Away from it? A. That is right.

Q. Then after the final decree your husband remarried?

A. That is right.

(Testimony of Minnie M. Cook)

Q. To Mrs. Evelyn somebody?

A. Evelyn Detweiler.

Q. Do you know when they were married?

A. No, I don't. I wasn't there.

Q. Now, let's get it clear, that you and your daughter lived in this homestead, you say, until March, 1943?

A. That is right. [12]

Q. But your final decree was on July 1, 1943?

A. That is right.

Q. Then you had left this homestead before the final decree?

A. Yes, I had. You see, the final decree wasn't until June 30 and I left in March.

Q. You went over to 5515½ South Broadway?

A. That is right.

Q. The divorce had been granted, but of course the final decree had not been entered?

A. That is right.

Q. Then I asked you when George returned to this 1513 West 105th Street.

A. He moved back in on the day I moved out.

Q. That was in March, 1943, you say?

A. I don't remember the exact day. I know it was in March.

Q. Are you sure that wasn't in 1942?

A. I don't remember. It was a year ago March.

Q. Mrs. Cook, did you rent this place at any time?

A. No.

Q. To any person? A. No, I didn't.

Q. When George moved back into the homestead property did you have an arrangement with him to pay you so much a month? [13]

(Testimony of Minnie M. Cook)

Mr. Brown: Objected to as immaterial.

The Referee: Do you mean as alimony or rent?

Mr. *Cook:* As rent, your Honor.

The Witness: No, I did not.

Mr. Clark: Q. Did he pay you so much a month?

A. No.

Q. He did not pay you $30 a month?

A. No, he didn't.

Q. Not at any time? A. No, he didn't.

Q. You heard his testimony at the first meeting up here in which he said he was paying $30 a month. What was that paid on?

A. He was paying rent or paying monthly payments on the property.

Q. Were you employed at that time when you moved away from there in March, 1943?

A. I was part time.

Q. Was your daughter employed?

A. No, she wasn't. She was still going to school.

Q. Is she employed now?

A. No, she is not. She works over at the Canteen nights, but she does not get paid for that.

Q. The only person who lives at this homestead is George O. Cook and his second wife?

A. That is right. [14]

Q. Did you keep a bank account in 1943?

A. I never did have a bank account.

Q. And you have not got one now?

A. No, I haven't.

Q. Have you any expectancies of inheritance?

A. No, I haven't.

(Testimony of Minnie M. Cook)

Q. Have you a mother who is a well to do woman?

A. I don't think she is very well to do.

Q. What is your mother's name?

A. Mayme E. Miller.

Q. She lives out in Venice? A. That is right.

Q. You are the only child?

A. That is right. She also has three grandchildren.

Q. Three grandchildren? A. Yes.

Mr. Clark: Well, that is a matter of law as to who an heir is.

The Referee: This old lady may make a will and cut them all out.

Mr. Clark: Q. Has she made a will?

A. As far as I know, she has.

The Referee: She is under no obligation. The courts have said they will not disturb a will unless there has been undue influence or fraud or something of that kind.

Mr. Clark: That is right. [15]

The Referee: However, if she should inherit anything within six months of the adjudication it will be an asset of her estate. All right, sir. What is the next question?

Mr. Clark: Q. Now, you were in partnership with your husband in this oil business in 1942, were you not?

A. I never was a partner to his business at any time.

Q. Weren't you a partner in the Coach Oil Company?

A. No, I never was a partner in the Coach Oil Company or never was a business partner of his at any time.

Q. Did you keep the books of that company?

A. Sure, I used to make entries in the books, but that doesn't mean I was a partner.

Q. You kept the books?

A. Yes, I was the bookkeeper.

(Testimony of Minnie M. Cook)

Q. A full set of books? You were here in this courtroom in 1941 on this bankruptcy proceeding of the Coach Oil Company? A. Yes, I was.

Q. Did you see the petition that was verified in that case?

A. No, I didn't pay any attention to it at that time.

Q. You knew that your husband had been operating it as the Coach Oil Company or the Koch Oil Company?

A. That is right.

Q. And you kept the books?

A. I made the daily entries. That is all I did. What [16] amount of money he took in or what he spent it for or all that. I don't know.

Q. Did you keep a full set of books?

A. Just on daily entries.

Q. And you went to the place of business to keep those books?

A. No, I didn't. I kept them at home.

Q. You kept them at home? A. Yes.

Q. You have been down to that number, haven't you? Do you know where it is, 9659 South Alameda Street?

A. I was there once or twice.

Q. Do you recall the sign that was up on the building?

A. No, I don't believe I ever looked at that sign.

Q. Wasn't there a big sign up there the Coach Oil Company?

A. I don't recall that there was. I don't know.

The Referee: Did these parties in 1941 file individual schedules as well as partnership schedules?

Mr. Clark: There is just one thing that I would like to call your attention to.

(Testimony of Minnie M. Cook)

Mr. Brown: I can answer that, if your Honor please. They filed as partners the Coach Oil Company. The attorney did not pay the fees and the case was dismissed.

Mr. Clark: Q. This case is No. 36,744-C, and I call your [17] attention to Schedule B-1, real estate, and ask you to look at the description of the real estate. That is the real property covered by the homestead, isn't it?

A. Yes, it is. I never looked it up in the records, but I suppose it is. I don't know.

Mr. Clark: I want to offer in evidence this schedule B-1, real estate, showing that this same real estate that they claim a homestead on was in this bankruptcy proceeding.

Mr. Brown: I will stipulate it was.

The Referee: Does it show there it was homesteaded?

Mr. Clark: Yes, it does, Your Honor. Therefore, it was individual.

Q. The partnership did not have any homestead on that property, did they?

Mr. Brown: Objected to as asking this witness for a conclusion.

The Referee: That is a legal question.

Mr. Clark: Q. You and your husband, George O. Cook, are the ones who owned that real property at that time? A. Yes, we were.

(Testimony of Minnie M. Cook)

Q. And the Coach Oil Company did not own it?

A. No.

Mr. Clark: I think that establishes it was individual, Your Honor.

The Referee: All right, sir. There is no attorney's name to this Coach Oil Company schedule. Who was your attorney, [18] Mr. Cook?

Mr. Cook: Paul H. Bruns.

The Referee: A tall, redheaded fellow who got in trouble later on?

Mr. Cook: Yes. I tried to locate him, but I can't find him.

The Referee: I remember him.

Mr. Parker: I think perhaps Your Honor's attention should be called to the fact that that former case was dismissed and adjudication vacated.

The Referee: It was?

Mr. Parker: The proceeding was dismissed and adjudication vacated. I just checked that a few minutes ago.

The Referee: That wipes it out, doesn't it?

Mr. Brown: My contention is, it is a dead issue.

The Referee: If the adjudication is vacated then it is out.

(Testimony of Minnie M. Cook)

Mr. Clark: Q. In relation to that case, Mrs. Cook, I want to call your attention to this question:

Section A under Subdivision 7 of your Statement of Affairs, "What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein? (Answer) None."

A. Is that the second time, you mean, or the first one? [19]

Q. This is your present petition.

A. What do you want me to answer on that?

Q. Here it is. Is that correct?

A. Well, according to that, it says none, but there was that bankruptcy, yes.

Q. Then that statement is not correct?

A. (No answer by the witness.)

Mr. Clark: That, Your Honor, is the answer in regard to whether or not there had been a bankruptcy.

The Referee: I have the file. It says this adjudication was set aside July, 1941. Anything further?

Mr. Clark: That is all.

The Referee: Any questions, Mr. Brown?

Mr. Brown: No questions at all.

The Referee: That is all, madam. Call your next witness.

Mr. Clark: I will call Mr. Wolford. [20]

LILA LORINE COOK,

called as a witness, was sworn and testified as follows:

Direct Examination.

By Mr. Clark:

Q. You are the daughter of Minnie M. Cook?

A. That is right.

Q. And George O. Cook?

A. That is right.

Q. In 1941 in November where were you living?

A. Home.

Q. That is at 1513 West 105th Street?

A. That is right.

Q. Do you recall that on or about that time your father, George O. Cook, left that place?

A. I don't know just when it was.

Q. You don't remember?

A. I don't know just when it was.

Q. Where do you live now?

A. At the present time I am living with my mother at 5515½ South Broadway.

Q. You live with your mother at 5515½ South Broadway? A. Yes, sir, temporarily.

The Referee: Is there any question as to the truth of the facts as related by Mrs. Cook that her husband left home? [52]

Mr. Clark: That is not the question.

The Referee: Counsel is trying to bolster it up by additional proof. Is there any question about it?

Mr. Brown: I will stipulate Mr. Cook left the domicile for a short time and then went back in it. He really never gave up possession.

Mr. Clark: I won't stipulate to anything like that.

(Testimony of Lila Lorine Cook)

The Referee: Is there any controversy over the veracity of Mrs. Cook's statement as to the time he left and the time he came back? If there is, I want further proof.

Mr. Brown: Yes, there is, Your Honor, because Mr. Cook was in and out of the home. Her testimony goes along a certain way.

The Referee: I thought if we had the fact established there was no use in gilding the lily. All right. What is your next question?

Mr. Clark: Q. You are not married now?

A. No, sir.

Q. Are you working now?

A. Only at the Hollywood Guild Canteen.

Q. How long have you been working?

A. There?

Q. Yes. A. About two and a half months.

Q. Did you work some other place than that?

A. Yes, sir. [53]

Q. Do you recall the time that your mother left this homestead, before her divorce or after it?

A. You mean before it was final?

Q. Was it before or after the trial?

A. I don't remember.

Q. Do you know whether it was before or after the final divorce? A. It was before.

Q. After your mother left there did any other person live there? A. Yes, my father and I.

Mr. Clark: That is all.

The Referee: Any questions, Mr. Brown?

(Testimony of Lila Lorine Cook)

Mr. Brown: When you worked at the Hollywood Canteen you did not receive a salary?

The Witness: No, sir.

Mr. Brown: That is all.

Mr. Clark: Q. Well, you worked as an usherette at a theatre, too, didn't you?

A. Yes, sir, before I went to the Canteen.

Q. How long was that?

A. About three months.

Q. Three months as an usherette. You got paid for that, didn't you? A. Yes.

Mr. Clark: That is all. [54]

The Referee: Call your next witness.

Mr. Clark: I think that is all we have to offer, Your Honor.

Mr. Brown: Now, we have no evidence.

The Referee: Is the matter submitted?

Mr. Brown: Matter submitted.

The Referee: All right. I don't see any merit to the objections to discharge, so the objections to discharge will be overruled and the discharge will be granted. I see no merit in the objection to the Trustee's report of exempt property because there are only two ways in which a homestead may be abandoned: one is by declaration of abandonment, and the other is by grant, neither of which occurred here.

Mr. Clark: Well, if Your Honor please, that is the point I want to argue.

The Referee: If you want to submit authorities I will hear you. I know the testimony.

Mr. Clark: That is all I want to argue.

The Referee: I will take the written citations on the abandonment. That is what you are interested in.

Mr. Clark: That is the point I had in mind.

The Referee: Give me authorities and I will look them up.

(Further discussion and citation of authorities omitted.) [55]

Before Referee in Bankruptcy, Hugh L. Dickson. Nos. 43,317-Y, 43,318-Y.

In the Matter of George O. Cook and Minnie M. Cook, Bankrupts.

REHEARING ON EXCEPTIONS AND OBJECTIONS TO TRUSTEE'S REPORT OF EXEMPTED PROPERTY.

Court reconvened in the above entitled cause at the hour of ten o'clock a. m., on October 5, 1944.

Appearances:

(Same counsel as before.) [56]

The Referee: In reading that case, Mr. Clark, you cited me the wrong one. The Court says there, "In the absence of minor children the homestead is resolved by divorce." Do you remember that language?

Mr. Clark: Yes, I do, Your Honor, and I have the case here. The case does not decide that, Your Honor. It merely says—

The Referee: That is the way I read it, in the absence of minor children.

Mr. Clark: It says, "Authority can be found," that is all the Court said, "To the effect that where the rights of children are concerned the homestead is not affected by the divorce where the decree is silent upon the question." And it cites certain cases. I have examined those cases critically.

The Referee: There were no children involved in this Lang case.

Mr. Clark: There was one, but he was an adult. It refers also to the second Bishop on Marriage. I have that here, also. That is not on homestead. That Bishop quotation is primarily to the obligation of the father to support the children and the results if the decree of divorce provides otherwise, and so forth. I would like to discuss that phase with Your Honor.

The Referee: Let me find out from this young lady whether she was a minor or not. Will you come forward, Miss. [57]

LILA LORINE COOK,

called as a witness on behalf of the Court, having been first duly sworn, testified as follows:

The Referee: Q. Now, tell us how old you were when your father and mother were divorced, that is to say, when your mother left this homestead property? How old were you?

A. I just turned seventeen at the time.

Q. I don't hear you.

A. Seventeen, I think.

Q. How old are you now? A. Eighteen.

Q. As I remember. wour mother said she left some time in 1943. Is that right, gentlemen?

(Testimony of Lila Lorine Cook)

Mrs. Cook: Yes, it is.

Mr. Clark: The husband left in November, 1941.

The Referee: The husband left some time in November, 1941 and the wife remained at the homestead property with this young lady.

Mrs. Cook: That is right.

The Referee: Until her husband came back in 1943. Is that the situation?

Mrs. Cook: That is right.

The Referee: Q. You remained there all the time?

A. Yes, sir.

The Referee: Any other questions? [58]

Mr. Parker: May I interpose something? Her name was not stated for the record.

The Referee: Q. What is your name?

A. Lila.

Q. Lila what? A. Lila Lorine.

Q. You are the daughter of George O. Cook?

A. Yes, sir.

Q. And Minnie M. Cook? A. Yes, sir.

The Referee: All right. Anything further?

Examination.

By Mr. Clark:

Q. Your testimony was you were living with your mother now?

A. I am just staying with her for a while.

Q. At 5515½ South Broadway, is that right?

A. Yes.

The Referee: Wouldn't the situation stem back to the date of bankruptcy and not where the child is living now?

Mr. Clark: Q. Do you know the date of your birth? Do you have your birth certificate? A. Of course.

(Testimony of Lila Lorine Cook)

Q. When were you born? A. October 8, 1925.

[59]

Q. 1925? A. Yes, sir.

Q. Did you say November? A. October.

The Referee: All I wanted to establish, I had overlooked whether or not she was a minor.

Mr. Brown: I would like to ask one question.

The Referee: Yes, sir.

Cross-Examination.

By Mr. Brown:

Q. You are a single woman? A. Yes, sir.

Q. You have been a single woman? A. Yes.

Q. You have never been married? A. No.

The Referee: As I understand from your testimony you resided with your father, George O. Cook, on this homestead property until I believe you said two or three weeks ago when you went to live with your mother?

The Witness: Two weeks ago.

The Referee: All right.

Mr. Brown: May I ask another question?

The Referee: All right, sir.

Mr. Brown: Q. Do you still consider—this is asking [60] for a conclusion—the home of your father is your home?

Mr. Clark: Wait a minute. I think that calls for a conclusion.

The Referee: Oh, yes, I think so.

Mr. Brown: Q. Is your personal clothing at the home of your father? A. At my home.

Q. At the home? A. Yes.

Q. The residence? A. Yes.

(Testimony of Lila Lorine Cook)

Q. Your personal clothing? A. Yes.

The Referee: What residence now, the mother or father?

The Witness: My father.

The Referee: You have left your personal effects at your father's home?

The Witness: Yes.

The Referee: You are now with your mother and have been for the past two or three weeks?

The Witness: Yes, sir.

The Referee: All right. Any other questions?

Redirect Examination.

By Mr. Clark:

Q. As to this homestead, do you know what street [61] address that is? A. 1513 West 105th Street.

Q. After your father left there in November you lived there with your mother how long?

A. About a year, I guess.

Q. Until 1942? A. I don't remember the date.

Q. Do you know when your father left the family in 1941? A. I don't know the date.

Q. Do you know that it was in 1941?

A. I don't remember that.

Q. Do you know where your mother lived in 1942?

A. At the house at 1513.

Q. Your mother lived at the homestead?

A. Yes, sir.

Q. With you? A. With me.

Q. She continued to live there how long with you?

A. Until my father moved in.

(Testimony of Lila Lorine Cook)

Q. Well, now, give us the date.

A. Well, my father has been living there now about a year and a half.

Q. Where did your mother go when she left the homestead? A. To 5515½. [62]

Q. Did you move over there with her?

A. No, sir.

Q. Your father and his second wife moved in when?

A. A year ago—oh, no, it wasn't a year ago—about seven or eight months ago.

Q. You lived there for a time with your father and his second wife? A. Yes, sir.

Q. Your stepmother? A. Yes, sir.

Q. But now you are living at 5515½ South Broadway?

A. I am not living there. I am just staying there for a while.

Q. You are staying with your mother?

A. Yes.

Mr. Clark: That is all.

Mr. Brown: One more question.

Recross-Examination.

By Mr. Brown:

Q. Your father has supported you continuously right up to the time you became employed by the—

Mr. Clark: Wait a minute. That is a leading a suggestive question.

(Testimony of Lila Lorine Cook)

The Referee: Well, over here, sir, we do not have any juries. If it is leading, if it leads to the truth, fine. [63] I feel I am qualified to disassociate the wheat from the chaff.

In other words, are you self supporting?

The Witness: Not right now.

The Referee: Not right now?

The Witness: Not right now.

The Referee: When you lived at your father's home up until a few weeks ago did you provide for yourself?

The Witness: Well, for three months I did. I was working then. But the rest of the time he was supporting me.

The Referee: When you were not working who supported you? Who took care of you and gave you food and clothing and shelter?

The Witness: My father.

The Referee: Your father?

The Witness: Yes.

The Referee: Any further questions?

Mr. Brown: That is all.

Mr. Clark: That is all.

The Referee: That is all I wanted to determine. Now, if you have any additional authorities, give them to me.

(Citation of authorities on the part of counsel omitted.) [64]

State of California, County of Los Angeles—ss.

I, Byron Oyler, Official Court Reporter, hereby certify that the foregoing sixty-four pages comprise a true and correct transcript of my shorthand notes of the testimony given in the above entitled matter.

Dated this 25th day of January, 1946.

BYRON OYLER,
Official Court Reporter.

[Endorsed]: Filed May 9, 1946 [65]

[Endorsed]: No. 11350. United States Circuit Court of Appeals for the Ninth Circuit. Master Lubricants Company, a corporation, Appellant, vs. George O. Cook, Minnie M. Cook, Ignatius F. Parker, Trustee in Bankruptcy of the estates of George O. Cook and Minnie M. Cook, Bankrupts, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 11, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
For the Ninth Circuit.

No. 11350

MASTER LUBRICANTS COMPANY, a corporation,
Appellant,

vs.

GEORGE O. COOK and MINNIE M. COOK,
Appellees.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON THE APPEAL, AND DESIGNATION OF THE PORTIONS OF THE RECORD FOR CONSIDERATION THEREOF.

A. For a statement of points to be relied upon under Rule 19(6), on this appeal, appellant hereby refers to and adopts appellant's statement of Points under Rule 75(d), Rules of Civil Procedure, heretofore filed in the United States District Court, and set out in the Clerk's transcript of Record, at pages 80-84 inclusive.

B. Appellant further designates as portions of the Record to be printed, that part of the Record on appeal, as certified by the Clerk of the District Court, and filed herein, including the Reporter's transcript, as necessary for the consideration of Appellant's points on appeal, the following parts and portions thereof:

1 Petition in bankruptcy of George O. Cook, including Schedules A and B, and Order of adjudication and reference, set out at pages 1-17 inclusive.

2 Omit petition, schedules A and B, and order of adjudication of Minnie M. Cook, set out on pages 18-33

inclusive, as they are, with the exception of name of bankrupt and the inclusion of an automobile valued at $70.00, in her Schedule B and the omission in Schedule A of a note owing to Mrs. Miller of $500.00, identical with petition, Schedules A. and B. and order of adjudication in the matter of George O. Cook.

3 Include Trustee's Report of Exempt property in the matter of George O. Cook set out at page 34 of Record, and same in matter of Minnie M. Cook, at page 35.

4 Include Objections and Exceptions of Creditor, Master Lubricants Company, a corporation to Trustee's Report of Exemptions in the matter of George O. Cook, set out at pages 36-39 inclusive.

5 Omit same matter in matter of Minnie M. Cook, set out at pages 40-43 inclusive, as they are identical with that in matter of George O. Cook, with exception of names of bankrupts.

6 Include Referee's Fndings of Fact and Conclusions of law, set out on pages 44-47 inclusive.

7 Include Referee's Order, over-ruling objections and exceptions of creditor to Trustee's Report of Exempt property, set out at pages 48-49 inclusive.

8 Include Petition for review of order of Referee by Judge, set out on pages 50-56 inclusive.

9 Include objecting Creditor, Master Lubricants Company's Exhibit No. 1 at trial before Referee, set out at pages 57-70 inclusive.

10 Include Referee's Certificate on Review, set out at pages 71-74 inclusive.

11 Include Order of United States District Court, denying petition for review and affirming Referee's order, set out at pages 75-76 inclusive.

12 Include Notice of Appeal set out on page 77.

13 Include cost bond set out on pages 78-79 inclusive.

14 Include Designation of Points by Appellant on which it would rely on appeal, set out at pages 80-84 inclusive.

15 Include Designation by Apellant of papers and matters to be included in Clerk's Record on Appeal, set out at pages 85-87 inclusive.

16 Include Clerk's certificate of Record set out pages 88-89 inclusive.

17 Include the following parts and portion of Reporter's Transcript of evidence before Referee at hearing on September 28th and October 5th, 1944, set out at pages 1-20 of said Transcript, covering stipulations and testimony of Minnie M. Cook. Also testimony of Lila Lorene Cook set out on pages 52-55 inclusive, of said Reporter's transcript; also testimony of same witness, on hearing October 5, 1944, set out on pages 56-64 of said transcript, and the Reporter's certificate at page 65 thereof.

18 This designation of points on appeal and parts of Record to be printed.

Dated June 10, 1946.

JAMES P. CLARK,
Attorney for Appellant.

[Endorsed]: Filed Jun. 11, 1946. Paul P. O'Brien, Clerk.

No. 11350

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MASTER LUBRICANTS COMPANY, a corporation,

Appellant,

vs.

GEORGE O. COOK and MINNIE M. COOK, Bankrupts, and IGNATIUS F. PARKER, Trustee of the Estates of Bankrupts,

Appellees.

BRIEF FOR APPELLANT.

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No. 11350

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Appellees.

BRIEF FOR APPELLANT.

Statement of Pleadings and Jurisdiction.

On June 13th, 1944, Appellees, George O. Cook and Minnie M. Cook, filed their separate petitions in bankruptcy, which were approved and referred to Hugh L. Dickson, Esq., Referee in Bankruptcy. [Tr. pp. 2-22.]

Assets set out in schedules attached to each petition are the same, with the exception that Minnie M. Cook claims an automobile worth $70.00. George O. Cook discloses assets amounting to $3100.00, and Minnie M. Cook $3170. George O. Cook's schedule of debts total $3924.80 (total is erroneously stated as $3424.80) and Minnie M. Cook's debts are scheduled as $3424.80. All assets disclosed in each petition claimed as exempt. [Tr. p. 19.] Petition and Schedules A and B of Minnie M. Cook, contained in Clerk's Certified Record, pages 13-33, are not included in

printed record, by request of Appellant [Tr. pp. 108-9], as they are identical with those of George O. Cook, with the exception that schedule of assets sets out an automobile worth $70.00, and her schedule of debts does not include $500.00 owing to a Mrs. Miller (mother of Minnie M. Cook).

Ignatius M. Parker was appointed Trustee of the estates of said Bankrupts, and in Reports of Exemptions, filed in each estate on July 17, 1944, all assets in each estate were allowed and reported as exempt. [Tr. pp. 23-26.]

On August 7, 1944, and within time allowed, Appellant served and filed written objections and exceptions to the Trustee's Report of Exemption, in each proceeding, of real property claimed as a homestead. [Tr. pp. 27-30.] Objections and Exceptions to Trustee's Report in Minnie M. Cook's bankruptcy, set out in the Clerk's Certified Record on Appeal at pages 40-43, are not included in the printed Record on Appeal, by direction of Appellant, as they are identical with those in the George O. Cook matter. [Tr. p. 109.]

Hearings of Objections and Exceptions to Trustee's Report of Exemptions were held on September 28 and October 5, 1944, before the Referee. At the outset of the hearing on September 28th, it was stipulated in open Court that all matters in each bankruptcy could be heard and considered at the same time, and that all testimony offered and received be considered in both matters. [Tr. p. 81.] And thereafter in findings, orders, etc., both bankruptcies were considered and determined as consolidated.

On October 5, 1944, both matters were argued and submitted and thereafter and on December 31, 1945, the

Referee made and filed his Findings of Fact and Conclusion of Law, and on the same day his Order as such Referee, overruling Appellant's Objections and Exemptions and approving the Trustee's Report of Exemptions. [Tr. pp. 31-37.]

On February 1, 1946, and within time allowed, Appellant served and filed its Petition for Review of Referee's Order by Judge of United States District Court. [Tr. pp. 38-46.]

On April 5, 1946, after hearing on April 1st, the United States District Court made its order denying Appellant's Petition and approving and affirming Referee's Order. [Tr. pp. 65-66.]

On May 3, 1946, Appellant filed its appeal from such order to this Court, and the Clerk of the District Court made service. [Tr. p. 67.]

On May 9, 1946, Appellant served and filed Designation of Points on which it intended to rely on appeal [Tr. pp. 71-75], and on the same day served and filed Designation of Papers and Matters to be included in the Clerk's Certified Record on Appeal [Tr. pp. 76-77]; Certificate of United States District Court attached [Tr. pp. 78-79]; Reporter's Transcript of Evidence [Tr. pp. 80-107]; Transcript filed with the Clerk of this Court on June 11, 1946; Statement of Points on which Appellant intends to reply on this appeal and Designation of Portion of Certified Record to be printed for consideration thereof. [Tr. pp. 108-110.]

This appeal was taken under Section 24a of the Bankruptcy Laws as amended in 1938 and 1939; also within the time fixed by Section 25.

Statement of Case.

The Bankrupts were formerly husband and wife and while such acquired the east 40 feet of the south 135 feet of Lot 7 in Sunnyside Heights, as recorded in Book 8, page 88 of Maps, in the Office of the County Recorder of Los Angeles County, State of California. This property was improved with a residence and situate at 1513 West 105th Street, Los Angeles, California. Deed made to bankrupts as joint tenants and recorded June 24, 1939. A declaration of homestead, in the execution of which both Bankrupts joined, was recorded June 22, 1940. [Tr. p. 32.]

Shortly after this homestead was recorded these Bankrupts, as partners doing business under the name Koch Oil Company, filed on July 24, 1940, their Petition in Bankruptcy, and adjudication and reference was had. This petition was filed in the United States District Court at Los Angeles, California, as No. 36,744-C, and in the list of assets included the above described real property and claimed exemption thereof as a homestead. [Tr. pp. 92-95.] The adjudication was set aside and the proceedings dismissed in July, 1941. [Tr. p. 96.]

It is a fair and probable inference that the Bankrupts recorded the Declaration of Homestead on June 22, 1940, with the intent and purpose of going into bankruptcy (which they did do about a month later), sloughing off their debts, and then coming out with the homestead property. But they were then in the oil business, as set out in their petition, at 9659 South Alameda Street in Los Angeles [Tr. p. 93], so they backed off from the bankruptcy proceedings and the same were subsequently abandoned.

In the present proceedings, both Bankrupts in Section A, subdivision 7 of Statement of Affairs, in answering

the question, "What proceedings under the Bankruptcy Act have been brought by or against you during the six years immediately preceding the filing of the original petition herein," answered "None." [Tr. p. 96.]

On or about September 17, 1941, Appellant, in a suit against George O. Cook and Minnie M. Cook, obtained a judgment against them in the Superior Court of Los Angeles County, California, in the sum of $3431.19 and costs. That partial satisfaction had been made on this judgment, and that at the date of the filing of the present proceedings there was due Appellant the sum of $2777.16 and claim for this amount was presented and allowed by Referee. [Tr. pp. 29-30, 34.]

On November 15, 1941, the husband, George O. Cook, left the homestead and deserted his wife, Minnie M. Cook, and his children [Tr. pp. 32, 47]; and on May 29, 1942, the wife filed suit for divorce on the ground of extreme cruelty against her then husband, George O. Cook, but in the complaint no real property is described and no mention is made of the homestead, and it is affirmatively alleged that there was no "community property." [Tr. pp. 47-49.] Service was had on the defendant in that case, but he did not appear or answer but made default and his default was entered. [Tr. pp. 50-51.]

On June 30, 1942, an Interlocutory Decree was entered in said action granting the divorce to the wife, the care and custody of the minor children and ordering defendant to pay to plaintiff for her support and that of two minor children $16.00 a week. No real property is mentioned in this Interlocutory Decree and no mention is made of the homestead. [Tr. pp. 53-54.]

The Bankrupt, Minnie M. Cook, after her husband left her on November 15, 1941, continued to reside at the

homestead with her daughter, Lila Lorine Cook, until sometime in March, 1943, when she left the homestead and moved to 5515½ South Broadway, in Los Angeles, and has not returned to the homestead at any time since. [Tr. pp. 33, 85.]

In March, 1943, the Bankrupt, George O. Cook, returned to the homestead when his former wife moved out and has since continued to live there. From March on to about a week prior to September 28, 1944, his minor daughter, Lila Lorine, lived thereat with him, when she moved over to 5515½ South Broadway with her mother, and has ever since lived with her mother. [Tr. pp. 33-34, 86-87.]

On July 1, 1943, the Final Decree in the divorce action was entered. This Final Decree also failed to mention any real property and did not mention or refer to the homestead. [Tr. p. 58.] Shortly after the entry of the Final Decree George O. Cook married Evelyn Detweiler and took her to live at the homestead. [Tr. pp. 89-90.]

On June 29, 1942, a written property agreement was made by the Cooks which gave the household furniture to the wife, provided for $16.00 a week to be paid to the wife for the support of herself and children and $100.00 attorney's fee to be paid by the husband in the divorce action, and it also contained a mutual waiver of inheritance and claims one against the other, but no mention is made of the real property owned by them and no mention or disposition of the homestead. [Tr. pp. 55-57.] This agreement was put in evidence in the divorce action as Plaintiff's Exhibit 1.

On June 13, 1944, the Cooks filed their separate petitions in bankruptcy, with schedules of assets and debts

practically the same, and each claiming this property, hereinabove described, as a homestead and exempt. The Trustee in Bankruptcy made his report exempting the claimed homestead and also all personal property. [Tr. pp. 23-26.]

Appellant filed written objections to the Trustee's Report, exempting the homestead, which were heard by the Referee on September 28 and October 5, 1944. It developed at the hearing that the minor daughter, Lila Lorine, had left the homestead about a week prior to September 28, 1944, and gone back to live with her mother [Tr. pp. 34, 87] and has lived with her ever since. [Tr. p. 34.]

Findings and Order made by Referee December 31, 1945, overruling Appellant's objections and exceptions and approving Trustee's Report of Exemptions. Petition for review of Referee's order by judge, served and filed and heard in the United States District Court at Los Angeles on April 1, 1946, and order entered April 5, 1946, denying petition and affirming order of Referee. On May 3, 1946, Appellant filed Notice of Appeal from said order to this Court.

Date of birth of Lila Lorine Cook, the minor, was October 8, 1925. [Tr. p. 103.] So this minor will be of age on October 8, 1946—very close at hand. But is it any longer of any importance, as the testimony and the findings indicate, that she left the homestead in September, 1944, and has lived away from there ever since? The divorce between the Cooks under the conditions disclosed by the pleading and decrees in that case show an abandonment in law, and the real property held in joint tenancy was remitted to the former owners, that is, each one-half of the property as his or her separate property, and the

homestead ceased to exist on entry of the divorce decree and long prior to the commencement of these bankruptcy proceedings. The decree of divorce restored to each of the Cooks their former status of single persons, and their several and separate ownership of one-half of the real property, formerly covered by the homestead, but freed of the homestead, as it was terminated by the divorce.

Assignment of Errors.

(1) The District Court erred in denying Appellant's Petition for Review of Referee's Order, overruling the objections and exception of Appellant to the Report of the Trustee in Bankruptcy, exempting as a homestead certain real property described therein.

(2) That the District Court erred in affirming the order of the Referee in Bankruptcy approving the Report of the Trustee in Bankruptcy, exempting to Bankrupts the real property described in such report, as a homestead.

(3) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupts, declared on jointly held property, did not become abandoned by reason of the divorce between the Bankrupts.

(4) That the District Court erred in affirming the order of the Referee in Bankruptcy, overruling the objections and exceptions of Appellant to the Report of the Trustee in Bankruptcy, exempting the real property therein described as a homestead of Bankrupts, in that said order of the Referee is not supported by his own Findings of Fact, but is contrary thereto.

(5) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupts, declared on jointly held

property, did not become abandoned by reason of the divorce between the Bankrupts, in that such order of the Referee is contrary to the evidence showing an abandonment of the homestead in the divorce proceedings between the Bankrupts.

(6) That the District Court erred in denying Appellant's Petition for Review of Referee's order set out in said Petition, in that the same is contrary to law.

(7) That the District Court erred in affirming the order of the Referee in Bankruptcy overruling Appellant's objection and exceptions to the Report of Trustee in Bankruptcy, exempting to Bankrupts the real property therein described, as a homestead, in that the same is contrary to law.

(8) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupts, declared on jointly held property, did not become abandoned by reason of the divorce action between the Bankrupts, in that the order of the Referee is contrary to and not supported by the evidence produced at the hearing, nor by the Findings of Fact made by the Referee on which such order is based.

(9) That the District Court erred in affirming the order of the Referee in Bankruptcy, presented in Appellant's Petition for Review, in that it affirmatively appears by the Findings of Fact of the Referee, on which such order is based, that at the time of the hearing of Appellant's objections and exceptions to the Report of the Trustee in Bankruptcy, and the evidence then produced, that there was then living on the former homestead only the Bankrupt, George O. Cook, and his second wife, and that no new homestead had been declared or recorded, on the real property involved herein, by the said George O.

Cook or his second wife, subsequent to the Final Decree of divorce between Bankrupts.

(10) That the District Court erred in affirming the order of the Referee in Bankruptcy, set forth in Appellant's Petition for Review, in that said order was not supported but was contrary to the Referee's Findings of Fact and the evidence in the reporter's transcript of evidence before the Court.

(11) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupt, Minnie M. Cook, had not become abandoned by reason of the divorce between Bankrupts, in that the said Minnie M. Cook, as shown by the evidence and Findings of Fact, had not lived on the homestead property since March, 1943, and at the time of the filing of her petition in bankruptcy was a single person and not the head of a family and resided away from the homestead, and then held a half interest in the real property covered by the homestead as her separate property, subject to the payment of debts.

(12) That the District Court erred in affirming the order of the Referee in Bankruptcy, deciding that the homestead of the Bankrupt, George O. Cook, had not become abandoned by reason of the divorce between the Bankrupts, in that he was adjudged in the divorce proceedings to be the guilty party, was not the head of a family and was a single person after entry of the divorce decree, and owning only a half interest as his separate property in the real property covered by the former homestead, which had become abandoned by the divorce between Bankrupts, and that he did not at any time subsequent to his remarriage thereafter declare or record a new homestead on the property involved.

ARGUMENT.

I.

In an Action for Divorce, Where Defendant Suffers His Default to Be Entered, and Neither the Homestead or the Property on Which It Is Declared, Is Mentioned in the Complaint or the Decree of Divorce, and the Court Makes No Disposition in the Action, of the Homestead, the Homestead Is Deemed Abandoned and the Parties Remitted to Their Former Status of Ownership of the Property.

In the case of *Burkett v. Burkett,* 78 Cal. 310, which was an action to quiet title by plaintiff against his former wife, it appears that the husband sometime prior to the divorce declared a homestead on his separate property, and then conveyed the property to his wife; in the divorce action nothing was said about the homestead and no action taken as to it; held that the wife by reason of the deed became the "former owner," and that upon the divorce being granted her title to the property became absolute. At page 317 the Court said:

> "It affirmatively appears from the record before us that the *plaintiff was not the innocent party in the divorce suit,* but if he had been his only right was to ask to have the property set apart to him in that proceeding. Not having done so, her title to the property became absolute as between them, from the granting of the divorce." (Italics ours.)

In the case of *Shoemake v. Chalfant,* 47 Cal. 432, the homestead was divided between husband and wife by decree of divorce, each to hold his or her allotted part free and clear of the claims of the other. Prior to the divorce

one Chalfant had a judgment against the husband and after the divorce levied on the husband's part of what was formerly the homestead; the Court, at page 435, said:

> "The question presented is, whether the premises in controversy remained the homestead of the plaintiff after they were allotted to him by the decree of divorce. The decree severed the sort of joint-tenancy of the parties in the homestead premises, which had been created by the homestead declaration, the residence of the parties, etc., under the provisions of the Homestead Act. *It also destroyed the right of survivorship.* The joint deed of both parties is no longer essential for alienation or abandonment of any portion of the premises. The family for whose benefit the provisions of the Homestead Act were mainly designed, was severed by the decree, and neither the husband nor the wife is entitled to reside on that portion of the homestead premises which was allotted to the other. All the principal qualities of the homestead estate, except that of exemption from liability for debts, etc., *having been destroyed by the decree, the latter in our opinion, was also destroyed. The decree was as effectual in its results as would have been a declaration of abandonment."* (Italics ours.)

In the case of *Huellmantel v. Huellmantel,* 124 Cal. 583, which involved a homestead, and wherein the Court awarded to the wife alimony and made no disposition of the homestead, the Court at page 588 said:

> *"The effect of the decree is to leave the title to the property in defendant Huellmantel freed* (italics ours) *from the homestead,* although the Court did not directly and explicitly assign it to the former owner, as section 146 directs the Court to do, if not assigned for

a limited period to the innocent party (Burkett v. Burkett, 78 Cal. 310)." (Cited in *Cooper v. Miller,* 165 Cal. 31, 34.)

The case of *Zanone v. Sprague,* 16 Cal. App. 333, is directly in point. There the homestead was declared for the benefit of husband and wife, on the separate property of the husband by the husband. Afterwards a divorce was granted on complaint of husband; the homestead was not disposed of by the decree of divorce; the husband died and the former wife claimed ownership of the property by reason of the declaration of the homestead, made during coverture, "and said homestead never having been abandoned during the lifetime of Coad (her former husband) by the mode prescribed by law." At page 336 of the opinion the Court said:

> "The decree of divorce is absolutely silent as to the homestead or other property, and, manifestly, in such case, if either or both of the propositions contended for by the defendant are maintainable, Catharine Powers had no interest of whatsoever kind or nature in the property in dispute at the time of the commencement of this action."
>
> "We are of opinion that the second proposition urged by the defendant, viz., that whatever interest in or rights under the purported homestead acquired by plaintiff's intestate *were lost upon the entry of the decree granting Coad a divorce from her, is sound and must be sustained.*" (Italics ours.)

Again quoting from page 337:

> " 'The policy of homestead laws,' says Waples in his work on 'Homestead and Exemptions,' page 29, 'is the conservation of homes for *the good of the state; the mischief to be prevented by this law is the*

breaking up of families and homes to the general injury of society and the state; the remedy provided is the exemption of occupied family homes from the hammer of the executioner,' and therefore, 'as to homestead statutes, liberal construction is the rule so far as concerns exemptions.' *(Id.) In other words, homestead statutes are not designed to screen debtors or to protect them against the performance of their just obligations, but to provide for the conservation of homes in the interest of the general welfare and to that end to protect homes against the business misfortunes or the improvidence of heads of families."* (Italics ours.)

And again from page 338:

"If, as we conceive to be the correct rule, the only interest of plaintiff's intestate could have in said homestead, after the divorce was granted, is limited to that interest which she might have acquired had the court found (and made an order accordingly) that the exigencies of the action for divorce warranted it in assigning said homestead to her for a 'limited period,' then, the court not having so found or made such assignment of the homestead, it seems to us that it of necessity follows that whatever rights she might have claimed under said homestead terminated, ipso facto, with the entry of the decree of divorce. Nor since the homestead was selected from his separate property, was it necessary, in order to vest in Coad the whole of the homestead interest, that the court should have expressly and by its decree or otherwise assigned to him said homestead. The 'family' for whose benefit the homestead was selected from the separate property of the husband having been destroyed by the decree of the court divorcing the parties, the homestead necessarily ceased to exist

as to that family, and the homestead, not having been assigned to the wife at the time of the making and entry of the divorce decree, the property so impressed, remained in its former owner, freed from and unencumbered by any claim which the former wife might have had to it by reason of said homestead (Waples on Homestead and Exemptions, p. 67 *et seq.;* Brady v. Kreuger, 8 S. D. 464 (59 Am. St. Rep. 771, 66 N. W. 1083; Hahn v. Starcks, 89 Tex. 203, 34 S. W. 103)." (Italics ours.)

So under the case at bar, where there was no mention of the homestead in the pleadings or the decree of divorce, the family relation was dissolved, and no assignment of the homestead for a limited or any period having been made, the homestead was also terminated and the husband and wife remitted to whatever ownership they had in the property, prior to its being impressed with the homestead; that is, separate owners, each of one-half, and as such subject to his or her debts. As each owned at the date of petition in bankruptcy one-half of the property, as his or her separate property.

We quote further from the case of *Zanone v. Sprague, supra,* page 340, wherein *Brady v. Kreuger,* 8 S. D. 464, is cited and quoted as authority and approved as follows:

"The decree of divorce made no disposition of the homestead—in fact it was absolutely silent upon that subject—but it was, nevertheless, contended by the appellants in that case that after a divorce the wife retains her interest in the homestead, and that under the facts proven in this case, she was entitled to retain possession of the premises occupied by herself and husband at the time the divorce was granted."

The Supreme Court of South Dakota disposes of this proposition adversely to the contentions of the appellants as follows:

> "Appellants contend that this court will presume, in the absence of testimony to the contrary, that the decree gave her the right to take possession of the homestead. But this we cannot do. Courts will sometimes indulge presumptions to support a judgment of a court but never to reverse it. In the absence, therefore, of any proof as to the contents of the decree of divorce, we cannot presume that it contained anything favorable to the defendants. *The relation of the husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court.* If the decree of the court preserved her rights to the homestead, or conferred upon her any other privileges in, or interest in or to, the property of the husband, the burden was upon her to establish such rights by the decree, as she clearly would have no right to the possession of the homestead after a decree of divorce had been granted, unless saved by the decree. There being in this state no right of dower, or other absolute claim of the wife upon the property of the husband, except under the law of succession, as his widow, and which depends solely upon the fact that she is such wife or widow, *she can only avail herself of these claims by showing that she occupies either one or the other of these relations named, to the husband. As the wife, upon a dissolution of the marriage, ceases to be the wife, and can never be the widow, of her divorced husband, her claims upon his property, necessarily, also cease and terminate upon the divorce.*" (Italics ours.)

The Appellant contends that is exactly the situation in the case at bar. Inasmuch as the decree of divorce made no disposition of the homestead nor of the property covered by the homestead, the wife, Minnie M. Cook, has no claim to the half interest of her husband or to or under any homestead that was formerly on his property. And the same is true as to the husband, George O. Cook; he has no interest or right in the property of the wife or any homestead which formerly covered her half interest. The homestead terminated as to both bankrupts by the decree of divorce rendered, and they each were remitted to their former status of ownership. If the property in question had been community property, they would have become tenants in common. Therefore, when they came into a court of bankruptcy and submitted their assets to adjudication therein, this Court can now consider only their status of ownership in the real property at the date they filed petitions of bankruptcy, and that was the ownership of an one-half interest in the property, which they each then held as his or her separate property.

> "The effect of a judgment decreeing a divorce, is to restore the parties to the state of unmarried persons."
>
> Civil Code of California, Sec. 91.

We now call the Court's attention to the leading case in California on this subject, the case of *Lang v. Lang,* 182 Cal. 765. That action was one for partition of property, formerly belonging to husband and wife, as community property and on which there was a homestead at the time of the divorce. The husband brought the divorce action; his complaint contained no reference to the homestead or any property, community or otherwise; the wife was served with summons and complaint, but failed to appear

and her default was entered and an Interlocutory Decree entered granting divorce to the husband, but made no mention of the homestead or any property. The Final Decree, however, set apart to the husband the homestead. Thereafter the wife brought action for partition of the property covered by the homestead. It was held that as the complaint in the divorce action tendered no issue as to the community homestead, and the Court made no finding as to the homestead or other property, the trial court was without jurisdiction in the final decree to make any order as to the property rights of the parties, such question not being before it; and the judgment of the trial court granting partition was affirmed. Upon the question of the effect of a divorce, granted by default, where neither the complaint or the findings, present issues as to homestead or property, the Court, at page 770, said:

> "However this may be, the law has made provision for the disposal of the homestead upon the dissolution of a marriage under which the rights of the parties may be equitably adjusted (Civ. Code, sec. 146, subd. 3). For reasons not disclosed by the record defendant failed to avail himself of this provision, for he raised no such issue in his divorce action. While as a general proposition a homestead cannot be made the subject of an action for partition, the principle has no force when applied to instant case. Here the family was severed by the decree of divorce and the qualities of the homestead estate were thereby destroyed (Rosholt v. Mehus, 3 N. D. 513, 23 L. R. A. 239, 57 N. W. 783; Bahn v. Starck, 89 Tex. 203, 59 Am. St. Rep. 40, 34 S. W. 103). Such a decree is as effectual in producing this result as would be a declaration of abandonment, for where, as here, the homestead, having been carved out of the community

property, and no proper disposition having been made of it by the decree, the parties became tenants in common thereof, and this being so each had the right to sever their joint ownership. (De Godey v. De Godey, 39 Cal. 157; Biggi v. Biggi, 98 Cal. 35 (35 Am. St. Rep. 141, 32 Pac. 803); Kirchner v. Dietrich, 110 Cal. 505 (42 Pac. 1064); Tabler v. Pevrill, 4 Cal. App. 671 (88 Pac. 994); Brown v. Brown, 170 Cal. 1 (147 Pac. 1168); and Shoemake v. Chalfant, 47 Cal. 432.) Under the circumstances of this case defendant upon the granting of the divorce ceased to be the head of a family, and he was no longer entitled to a homestead exemption of the character here involved. (Zanone v. Sprague, 16 Cal. App. 333 (116 Pac. 989).) No family, no homestead. (Waples on Homestead Exemptions, p. 70.) The homestead being destroyed, the parties as tenants in common could convey or sever their relative interests therein. (Simpson v. Simpson, 80 Cal. 237 (22 Pac. 167); Grupe v. Byers, 73 Cal. 271 (14 Pac. 863); and Brown v. Brown, *supra;* 13 Ruling Case Law, p. 679.)"

This case has never been overruled, but was approved in a recent case determining homestead rights as between husband and wife, *Walton v. Walton,* 59 Cal. App. 26, 29, where it was said:

"And that once the wife impresses premises with a valid homestead, the husband is without power to destroy it except in the manner provided by statute (Mills v. Stump, 20 Cal. App. 84 (128 P. 349), that is by an instrument executed and acknowledged by the husband and wife (secs. 1242 and 1243, Civ. Code), *or by a decree of divorce* (Lang v. Lang, 182 Cal. 765, 190 Pac. 181)."

At page 34 of the *Walton* case the Court said:

> "In the case of Lang v. Lang, *supra,* the homestead was declared on community property, and the court fully recognized the general rule above mentioned that a homestead is not subject to an action for partition, but it was held under the facts of that case the rule did not there apply for the reason that the family was severed by a *decree of divorce and the qualities of the homestead estate were thereby destroyed.*" (Italics ours.)

In the case of *Lang v. Lang, supra,* the rights of minor children were not involved; the only issue of the marriage was a son, who at the time of decree of divorce was of age; the Court said at page 770 of the decision, "Here, however, the rights of minor children are not involved." Nor did the Court say that if there had been minor children its decision would have been different from that given, that question not being involved; what was said as to minors was mere *dicta.* At page 769 is to be found this statement:

> "Authority can be found to the effect that where the rights of children are concerned, the homestead is not affected by the divorce, where the decree is silent upon the question."

Then citing three out of state cases. These I have examined carefully, and find that only one case seemingly supports the rule referred to; the second case is directly against it and in harmony with the *Lang* case and in the third, the rights of minor children are not involved.

The first case cited, *Redfern v. Redfern,* 38 Ill. 509, was an action of ejectment brought by the former wife, after husband had obtained a divorce on the ground of

adultery. The action was based upon two deeds, the first from husband and wife (the Redferns) to one Houts and a deed made later by Houts to Mrs. Redfern. In previous years, and before the deed to Houts, the property had been made a homestead by the Redferns. The husband returned from the army in 1862; the wife refused to live with her husband; he broke into the house with an axe and took possession; the wife left and the suit for divorce followed. Nothing is set out as to the terms of the decree. Redfern continued to live at the place with two minor children. The Court held that the homestead had not been abandoned by the deed of husband and wife to Houts. Ejectment denied and former husband continued to live on property under the homestead. Decree in 1865. Under the statutes and decisions in California a deed by husband and wife to a third party is an abandonment of the homestead and the basis for the *Redfern* decree is not clear. It is not good law in California.

The case of *Holcomb v. Holcomb,* 18 N. D. 561 (120 N. W. 547), is one where the wife got the divorce, was awarded the custody *of the minor child and a sum of money annually for the boy's care and education.* (Italics ours.) The father died shortly after the divorce and on petition of the mother the homestead property was set apart for the minor child by the probate court. On appeal to the District Court the decree was reversed and on further appeal to the Supreme Court the reversal by the District Court was upheld, the Court holding with the *Zanone v. Sprague* and *Lange v. Lange* cases *that the divorce destroyed the homestead, as the decree of divorce made no disposition of it, and that at the date of Holcomb's death he was a single man, as the previous divorce had changed his status.* (Italics ours.)

In the third case cited, *Byers v. Byers,* 21 Iowa 268, the wife in 1864 got a divorce from her husband, to whom she had been married in 1824. Eight years before divorce homestead was established on 40 acres. No mention of homestead in decree. Wife was awarded alimony in sum of $2000. Execution was had on other property of husband and $1500 realized. Sale of homestead property sought by wife on second execution, but was enjoined at suit of former husband on the ground it was his homestead. *Rights of minor children not involved; no evidence of any children.*

2 Bishop on Marriage, Divorce and Separation, Section 1210, is also cited in the *Lang v. Lang* case, *supra.* But this section relates to the responsibility of the father to support and maintain his children and does not deal with the subject of homestead rights or status as affected by divorce or otherwise.

In the case at bar an order was made as to the custody of the children, awarding them to the mother, and also for their maintenance by the father; and this to continue during the minority of the minor daughter. If, as the testimoney indicates, the father did maintain or contribute to the maintenance of the minor daughter in a limited way and for a limited time, *this was nothing more than was imposed upon him by order of Court, and could not improve his position as to the homestead.*

The three out of state cases cited in the *Lang* case, following the statement, "Authority can be found to the effect that where the rights of children are concerned the homestead is not affected by divorce where the decree is silent on the question," are not apt and not authority for

the above statement. The *Redfern* case did involve minors, but an abandonment of the homestead, such as is provided by Section 1243 of our Civil Code, was shown, inasmuch as the husband and wife, prior to the divorce, made a deed of the property covered by the homestead to a third party, and moreover the terms of the divorce decree are not shown, and it cannot be determined whether the divorce decree was silent as to the homestead or not.

The *Holcomb* case involved a minor, but is not authority for the above citation in the *Lang* case; in fact it is directly contrary to that contention, and is in fact in full accord with the doctrine set out in the *Lang* case, that a divorce without disposition of the homestead, notwithstanding there is a minor child of the parties, puts an end to the family relation and homestead; the defendant husband became a single person, his separate property was freed of the homestead, and that his minor son could not, after the death of his father, have the homestead property set aside to him as a probate homestead.

The third case cited, the *Byers* case, did not involve children at all, either minor or major; the decree gave the wife $2000 alimony, and after realizing $1500 on execution sales of the husband's property, she levied on the place on which a homestead had been declared prior to the divorce and on which the husband lived. The divorce decree made no disposition of the homestead; the wife's writ of sale was enjoined on the ground that this was the husband's homestead. This property was the separate property of the husband, and became his absolutely free from the homestead, under the California decisions, after the divorce. It is not authority for the citation; it is not even in point, as there were not any minor children involved.

II.

Children Have No Rights in Homestead of Parents While Parents Are Alive.

"Whether children have any rights in premises occupied as a homestead at the time of a divorce, depends largely upon the terms of the statute in the particular jurisdiction. *They have no rights therein except such as the statute gives them.*" (Italics ours.)

Wiggins v. Russell, 58 N. H. 329;
Heaton v. Sawyer, 60 Vt. 495 (15 Atl. 165).

"At the same time it is provided by statute that the title to a homestead shall be vested by decree of court, granting a divorce, in the wife, and after her death it shall pass to the children."

Jackson v. Shelton, 89 Tenn. 82 (16 S. E. 142).

But the right under such a statute is lost when the wife does not seek and obtain it.

Carey v. Carey, 163 Tenn. 486 (42 S. W. (2d) 498).

The only rights of minors under a homestead in California is found in the Probate Code, and after the death of the father or mother. After a divorce which expressly or by omission in the decree to deal with the homestead, it is lost; even the probate provisions of the law do not apply, as there is no survivor to take, and if a homestead can be set off to a minor, it must be by decree of the Probate Court. Of course, if the husband or wife dies, without the destroying intervention of a divorce decree, the survivor or heirs take, and it may be set aside to minors during minority.

There is no statute in California giving a minor child a vested or present interest in a homestead declared by its parents. This has been expressly held by the Supreme

Court of California in the case of *Gerlach v. Copeland,* 212 Cal. 758, in which at page 760 it was said:

> "It is obvious that the declaration of homestead neither created nor vested any present title or interest in the minor son at the time the declaration was made and that any interest to which he might become entitled would be by virtue of the provisions of section 1265 of the Civil Code, *i. e.,* by succession as an heir."

The mother who filed the declaration of homestead in the above case claimed rights on behalf of a minor son by reason of the homestead.

III.

Joint Tenancy Between Husband and Wife Creates a Condition in Which the Interest of Each Spouse Is the Ownership of Separate Property.

Joint tenancy in property between husband and wife creates a condition in which the interest of each spouse is separate property.

Siberell v. Siberell, 214 Cal. 767, 770;
In re Kessler, 217 Cal. 32, 34.

> "This court has recently determined that in the absence of any evidence of an intent to the contrary, when property is purchased with community funds and the title is taken in the name of the husband and wife as joint tenants, the community interest must be deem severed by consent, and the interest of each spouse therein is separate property (Siberell v. Siberell, 214 Cal. 767 (7 Pac. (2nd) 1003)."
>
> *Delanoy v. Delanoy,* 216 Cal. 23, 26.

In the divorce action between the Bankrupts the complaint alleges, "That there is no community property." [Tr. p. 48.] Neither the Interlocutory nor the Final

Decree of divorce mentioned any property, community or otherwise, and this was an adjudication that there was no community property.

A like situation existed in the case of *Brown v. Brown,* 170 Cal. 1, and at page 6 the Court said:

> "Although the final decree is silent as to property, it nevertheless operates as an adjudication that at the time the action was begun there was not community property."

The above is approved in *Metropolitan Life Ins. Co. v. Welch,* 202 Cal. 312, in which at page 317 it was said:

> "Therefore, whatever other property either of said parties then owned or was interested in, in so far as its community character was concerned, was by said decree determined to be the separate property of the particular spouse in whose name it was then held."

Divorce destroys even the right of survivorship to the homestead property.

Shoemake v. Chalfont, 47 Cal. 432, 435;
Zanone v. Sprague, 16 Cal. App. 333, 336-338;
Brady v. Kreuger, 8 S. D. 464.

The homestead declaration did not change this status and the decree of divorce, where no mention of the homestead was made, remitted each of the parties their former status of separate ownership, and neither could have or enjoy a homestead on the separate property of the other.

In the case of *Weinreich v. Hensley,* 121 Cal. 647, the wife had filed a homestead on separate property of the husband, the husband died and the homestead ended. It was held that the interest of the widow as heir or devisee in a homestead which has ceased to exist upon the separate property of deceased husband, is subject to attachment by her creditors.

IV.

A Husband's Rights in a Homestead on the Separate Property of Wife and Those of the Wife on the Separate Property of the Husband, Are Terminated by a Decree of Divorce Which Is Silent With Respect Thereto.

Burkett v. Burkett, 78 Cal. 310;

Skinner v. Walker, 98 Ky. 729 (34 S. W. 233);

Mize v. Boston, 185 Ky. 272 (215 S. W. 33);

Kern v. Field, 68 Minn. 317 (71 N. W. 515);

Gummison v. Johnson, 149 Minn. 329 (183 N. W. 515);

Klamp v. Klamp, 58 Neb. 748 (79 N. W. 735);

Arp v. Jacobs, 3 Wyo. 489 (27 Pac. 800).

In the case of *Gummison v. Johnson, supra,* it was held:

That a divorce even though obtained in a foreign state, cuts off a husband's homestead rights in his wife's property.

In the case of *Klamp v. Klamp, supra,* it was held:

That a husband's inchoate right to select a homestead from his wife's separate property, with her consent, lapses on the entry of a decree of divorce.

In the case of *Arp v. Jacobs, supra,* the Court, in holding that a divorced husband lost all rights in the homestead of his former wife, said:

> "But where he (the husband) permitted his family to separate and the homestead is not in his own name and has lost the homestead character, where it has been adjudged his fault, the conditions have changed. He has no longer a homestead for his family, has ceased to be the head of a family, and at the passing

> of the decree of divorce he loses completely all rights he had in the premises, even that of a possible survivor of his former wife."

In the case of *Holcomb v. Holcomb,* 18 N. D. 561 (120 N. W. 547), it was held that a divorced husband, who by the decree of divorce has been deprived of the custody of his minor son, awarded to the mother, and who by the terms of the divorce decree was required to pay the mother a set sum for the support and education of the minor, which allowance was by the divorce decree made a lien on his separate property, formerly used as a homestead, that the husband after the divorce became a single person and that the homestead ceased to exist.

And in *Zanone v. Sprague,* 16 Cal. App. 33, it was held:

That a wife's right of homestead in the separate property of her husband is terminated by a decree of divorce which makes no reference thereto.

In *Brady v. Kreuger,* 8 S. D. 464 (66 N. W. 1083), the Court said:

> "The relation of husband and wife having terminated, the wife ceased to have any claim upon or right in the husband's property, whether homestead or otherwise, unless such rights were preserved by the decree of the court."

In *Skinner v. Walker, supra,* in commenting on the situation, after a divorce, the Court said:

> "The joint occupancy and enjoyment of the homestead, by the man and woman, became utterly impracticable after the severing of the marital relations and that certainly was not contemplated by the legislature. Consequently setting apart his land for her

> use as a homestead, after such divorce, results in wholly depriving him as long as she chooses to occupy it; and to do that the court has no more authority than, after they are divorced, take her land occupied at the time and give it to him as his homestead. . . . In our opinion the divorce from the bonds of matrimony, effectually extinguishes the right of either husband or wife to the homestead owned by the other, as it by operation of Sec. 2144 bars the claim of either to the real or personal property of the other."

In the case of *Stamm v. Stamm,* 11 Mo. App. 598, it was said:

> "The claim of homestead made . . . by a divorced wife, does not give her any right as against the husband in his real estate, occupied as a homestead by her and the infant child of both, at the time or since the divorce."

In the divorce action of *Quagelli v. Quagelli,* 99 Cal. App. 172, the plaintiff (wife) appealed from the judgment granting divorce on the ground of desertion and dividing community property, including a homestead, equally between her and her husband, on the grounds that the finding against her on the grounds of extreme cruelty and habitual intoxication were not supported by the evidence and that she as the innocent party should have had a greater portion of the property than one-half. The Court of Appeal reversed on the ground that the finding on the question of cruelty was against uncontradicted and corroborated testimony and that the division of property was not authorized by law, in that the statute provided that in case of divorce on ground of extreme cruelty or adultery, the innocent party is entitled to more than one-half of

community property. In its opinion reversing the judgment the Court, at page 177, said:

> "Under the provisions of subdivision 3 of section 146 of the Civil Code, the court is authorized to assign the homestead to the innocent party either absolutely or for a limited period, or it may be divided, or be sold and the proceeds divided. The section does not authorize the court to assign an undivided one-half interest in the homestead to the party at fault, as has been done here. In determining the proper division of the community property the trial court will also determine the course to be pursued as to the homestead property—by either assigning it to the appellant absolutely, or for a limited period, or by dividing it between the parties, or by ordering it sold and the proceeds thereof divided—in either awarding the appellant such proportion thereof as she may be entitled to receive under the views hereinbefore expressed."

In the instant case the divorce between the Bankrupts was granted on the ground of extreme cruelty, custody of the minor child awarded to the mother, and the defendant in divorce action ordered to pay to the mother a fixed sum for her support and that of the minor child. Nevertheless, in the absence of any provision in the divorce decree as to the homestead, the guilty party moves in and claims the homestead and still claims it, as against his creditors in bankruptcy. And his former wife, Minnie M. Cook, also claimed it as her homestead and exempt from the claim of her creditors, although she moved away from the homestead in March, 1943, and has not since returned thereto. And the minor daughter, Lila Lorine, who will be of age on October 8, 1946, left the homestead

shortly prior to September 28, 1944, and went to live with her mother at another address, where she has lived since that time, as found by the Referee in his Finding IV. [Tr. p. 34.] That leaves the Appellee, George O. Cook, living on the homestead with his second wife. She could not have or enjoy a homestead declared by the first wife and partly on the separate property of the first wife, nor would such homestead inure to her or her present spouse. The homestead was recorded in 1940 and this second marriage took place after the final decree of divorce was entered August 1, 1943.

In the case of *Santa Cruz Bank v. Cooper,* 56 Cal. 339 the defendant Cooper, while a widower, residing on certain real property, with two minor children, declared and recorded a homestead as head of a family thereon; several years later Cooper remarried; and about six years after this marriage Cooper executed a conveyance to the property, in which his wife (the second wife) did not join. In an action of ejectment the defendants as a defense contended that Frank Cooper acquired the homestead in question by virtue of being the head of a family, and that the right thus acquired inured upon his subsequent marriage to the benefit of his wife, and that thereafter the property could not be disposed of without the joint act of both husband and wife. It was found that the two minor children came of age before the second marriage and before the execution of the conveyance, and that the homestead ceased to exist thereafter. As to the second wife the Court, at page 341 of the opinion, said:

> "The homestead right which attached to the premises by virtue of the declaration filed by Frank Cooper on the 24th of May, 1867, having ceased to exist long prior to his marriage with the intervenor, and

there having been no declaration of homestead filed by either after their marriage, it results that the joining of the wife in the conveyance to the plaintiff was not necessary, the property being the separate property of the husband."

This decision is pertinent on several points. 1. That a second marriage does not bolster up or sustain a prior claimed homestead. 2. That if declared by a single man, as the head of a family, and claiming it expressly on the ground of minor children living with declarant, it ceases when they become of age. 3. That the homestead thus declared does not inure to the benefit of a wife subsequently married.

V.

Divorced Man, Where Custody of Minor Children Awarded Wife, Not Head of Family.

It has been held that under a statute defining "head of a family" to mean the husband or wife, when claimant is a married person or any person who has been residing on the premises, his child, etc., a divorced husband, who by the decree has been deprived of the custody of his minor child and is required to pay the mother a stated sum for its support, which allowance is made a lien on the former homestead, is not "the head of a family."

Holcomb v. Holcomb, 18 N. D. 561.

One whose wife has secured a divorce because of his delinquencies cannot thereafter select a homestead in her land.

Klamp v. Klamp, 58 Neb. 748 (79 N. W. 735).

INTERLOCUTORY DECREE.

"It has been determined in a divorce action under the provisions of our code the function of an interlocutory decree includes not only the establishment of the right of a party to a divorce but includes also the hearing and final determination of the rights of the parties as to property. Any disposition of the property rights made in connection with the hearing of the principal cause of action is regularly included in and becomes a part of the interlocutory decree. If no appeal be taken, such decree becomes final with respect to those property rights, as well as to the adjudged right to a divorce (Huneke v. Huneke, 12 Cal. App. 199, 203 (107 Pac. 131); Pereira v. Pereira, 156 Cal. 1 (134 Am. St. Rep. 107, 23 L. R. A. (N. S.) 880), 103 Pac. 188. Necessarily the same consequences follow where the court takes into consideration and includes in its interlocutory decree the matter of the provision for the support of the wife."

Newell v. Superior Court, 27 Cal. App. 343, 344-5.

And where interlocutory decree makes no disposition of the homestead, the Court is without jurisdiction to make such disposition in the final decree.

Lang v. Lang, 182 Cal. 765, 767-9.

Where wife separated from husband by agreement and property divided, she having with her a minor child, can-

not after his death claim and have homestead set apart to her.

Wickersham v. Comerford, 96 Cal. 433.

A joint tenant may alienate or convey to a stranger his part or interest in the joint property.

Kissam v. McElligott, 280 Fed. 212.

VI.

Burden of Proof on Bankrupt Claiming Exemption on Objections to Trustee's Report Allowing Exemptions.

Matter of Rainwater, 191 Fed. 738;

McGahan v. Anderson, 113 Fed. 115;

In re Turnbull, 106 Fed. 667.

VII.

In Determining the Right to Exemption Under State Statutes These, as Interpreted by the Highest Judicial Tribunals of the State, Are Controlling.

Eaton v. Boston Safe Dep. & Tr. Co., 240 U. S. 427.

VIII.

After Divorce Where Decree Makes No Disposition of Homestead Property (Community) Parties Become Tenants in Common.

Tarien v. Katz, 216 Cal. 554, 559;

Taylor v. Taylor, 192 Cal. 71, 75;

Stewart v. Sherman, 22 Cal. App. (2d) 198, 203;

Estate of Brix, 181 Cal. 667, 676.

IX.

When Homestead Declared the Husband, George O. Cook, Was a Married Man and Homestead Declared Under Sections 1238 and 1239 on Joint Tenancy Property and His Rights Were Not Taken as the Head of a Family.

Sections 1238 and 1239 control when declaration on jointly held property and the homestead was so declared. There is another provision in 1238 for "unmarried man." If the claimant be an unmarried person, other than the head of a family, the homestead may be selected from any of his or her property. Now if the homestead in the divorce proceedings, by being divided, or awarded to one or the other of the parties or vacated as may be done by the Court or by failure of the Court in the proceedings to take any action thereon, where it is not presented in the pleadings (as in the case at bar), then how could one of the Bankrupts revive or continue the homestead by having a minor child live with him? As he is not a married man, after the divorce, it is true he may be the head of a family, by reason of having any of the persons mentioned in Section 1261 live with him, and this would enable him to then file a declaration of homestead on any property owned by him, but this would be a new declaration and under different circumstances. He could not by merely living on property in which he had a half interest claim and hold under the old homestead, which had been vacated by the divorce—that would be to say that he could have a homestead on the separate property of his former wife. As it cannot be a homestead for George O. Cook,

neither could it be for Minnie M. Cook. That homestead was non-existent when the bankruptcy petitions were filed.

Appellant submits that the order and judgment of the District Court should be reversed and said Court directed to enter its order and judgment granting Appellant's petition and overruling and setting aside the order of the Referee in Bankruptcy overruling Appellant's objections and exceptions to Trustee's Report of Exemption of homestead property to Bankrupts and approving said report; and ordering and adjudging that the real property covered by such former homestead be declared an unexempt asset of Bankrupts, subject to be sold as such to pay allowed claims of their creditors; for costs of this appeal, and costs in the District Court and before the Referee, and for such other and further directions as this Court may deem proper.

Respectfully submitted,

JAMES P. CLARK,
Attorney for Appellant.

No. 11350.

IN THE

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Appellant,

vs.

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Appellees.

BRIEF FOR APPELLEES.

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Appellees.

BRIEF FOR APPELLEES.

Statement of the Case.

The facts as stated by Appellant are approximately correct, except that Appellant attempts to make a point that the minor child had removed from the homestead and had been living with her mother about a week at the time the hearing was had (App. Br. p. 6, lines 8-13; p. 7, lines 7-11; p. 7, lines 24-27). We feel that all this is immaterial, and that the status of the property and the rights of all parties therein were fixed as of the date of bankruptcy, to-wit, June 13th, 1944, at which time it is apparent that the minor child was residing in the homesteaded property, with her father, George O. Cook. However, if the Court should feel that it is material, then we call attention to the fact that the absence of the minor from the

homestead was only temporary [Tr. p. 102, lines 25-27, and p. 105, lines 15-18], and that all of her personal belongings still remained in the homestead. [Tr. p. 103, lines 29-32, and p. 104, lines 1-11.]

Question to be Determined.

The controversy boils itself down to one simple question, to-wit: Does a decree of divorce between a husband and wife, which makes no mention or determination as to a homestead, put an end to the homestead WHEN THERE IS A MINOR CHILD INVOLVED?

Argument.

Counsel has cited numerous cases, but so far as we can see, there is not a single case on this question in which there was a minor child to be considered.

There is little doubt but that where the family relationship is completely severed by a decree of divorce, so that there is no longer any *family relationship* to be protected by the homestead, then and in that case the homestead falls. But what is a "family," and what is a "family relationship?"

The principal cases cited by the Appellant, to-wit, *Zanone v. Sprague*, 16 Cal. App. 333, and *Lang v. Lang*, 182 Cal. 765, were both cases in which there was no minor child, and therefore, when there was a decree of divorce, the family relationship ceased to exist; and therefore there was no one to be protected by the homestead. And it seems quite clear that such a distinction was recognized by the Courts in these cases, because in the *Lang* case the Court expressly based its ruling on the fact that there was no minor child involved. The Court bases its deci-

sion upon the fact that since there was no minor child involved, the family relationship between the husband and wife was severed by the decree of divorce and the qualities of the homestead estate were thereby destroyed; the inference seems clear that if there had been a minor child, the ruling would have been different. The Court says "no family, no homestead!" The inference seems clear that if there *is* a family, the homestead still endures.

And where there is a minor child of the parties, there still remains a "family" even though the husband and wife are divorced. It appears as the underlying note in all of the cases cited by Appellant, that the purpose of the homestead is to protect the "family," and that so long as there is a "family relationship" which is not severed by the divorce, the homestead remains to protect that "family." In the *Zanone* case, *supra,* at page 338, the Court says:

> "The 'family' for whose benefit the homestead was selected from the separate property of the husband having been destroyed by the decree of the Court divorcing the parties, the homestead necessarily ceased to exist *as to that family,* * * *" (Italics ours.)

In the present case, the "family" for whose benefit the homestead was originally selected, included Mr. and Mrs. Cook, *and their minor children.* When the Cooks were divorced, there still remained as a family, Mr. Cook and the minor daughter, who were then and there actually residing in the premises and using it as their home. So, the family for whose benefit the homestead was selected, still existed. Instead of a man, his wife, and their minor children, it consisted only of the man and his one minor daughter, but IT WAS STILL A FAMILY, and as such entitled to the protection of the homestead.

The case of *Walton v. Walton,* 59 Cal. App. (2d) 26, while not exactly in point, nevertheless shows what our California Courts believe to be the basic idea behind a homestead. At page 36, the Court quotes as follows:

> "The beneficient idea undoubtedly is to make and preserve for every family a shelter of a home, to be free, as long as husband or wife *or a minor child* (italics ours) shall live and occupy it, from the common vicissitudes of life."

The case of *Remley v. Remley,* 49 Cal. App. 489, holds that if a decree of divorce destroys a homestead, it is only the *final* decree which will have that effect; not the interlocutory. The final decree in the present case was July 1st, 1943. What was the condition on July 1st, 1943? The evidence discloses that on that date, Mr. Cook and his minor daughter were residing as a family, in the homesteaded property. Since the decree of divorce is silent as to any disposition of the homesteaded premises, we must consider whether or not on July 1st, 1943, the family relationship which the homestead was put on to protect, still existed, or whether because of the divorce there was no longer any family relationship to be protected. It seems to us that the answer obviously is that there still existed a family, to-wit, Mr. Cook and his minor daughter; and if there was still a family to be protected, then the law cited in the *Zanone* and *Lang* cases is not in point because the circumstances are different.

It must be remembered that the property in question was at all times, and still is, the joint property of Mr. and Mrs. Cook; they held, and still hold, as joint tenants, and not as tenants in common. The decree of divorce did not mention the property, or deal with it in any way, so

they were and still are, joint tenants. So, under the law, each of them owns the whole of the property, vested as of the date of the original deed, and subject only to the possibility that by the death of either the rights of the deceased one therein would terminate. So the homestead of each is a homestead upon the entire property, and not upon an undivided one-half interest as Appellant seeks to imply.

There is one case, *City Store v. Cofer,* 111 Cal. 482, in which a married woman filed a homestead upon her separate property for the benefit of herself and her husband; she obtained a divorce from him, and the property was not mentioned; a creditor levied upon the property on the theory that the homestead was vacated by the decree of divorce, but the Court held that the homestead was still valid. This particular case is cited by the Court in the case of *Zanone v. Sprague, supra,* at page 342, wherein the Court says:

> "Whether, under such circumstances, such property would still retain the essential characteristics of a homestead, so far as the 'former owner' is concerned, need not be decided here, although such has been declared to be the rule in this State . (City Store v. Cofer, 111 Cal. 482, 44 Pac. 168.)"

Summarizing, it seems to Appellees that there is no absolute California decision directly on the point of whether or not a decree of divorce in which no mention of homesteaded property is made, vacates a homestead WHEN THERE ARE MINOR CHILDREN INVOLVED. The nearest case, apparently, is the *Lang* case, *supra,* in which the Court lays down the rule that *in the absence of any minor child* a homestead is vacated by a decree of divorce in which

the property is not mentioned. By expressly making its ruling conditioned upon the fact that there was no minor child involved, it seems to us that inferentially the Court was stating that had there been a minor child involved, its ruling would have been different. And this is still further borne out by the fact that in all of the cases cited by Appellant, there was no minor child involved, and the "family relationship" which was severed by the divorce was only the family composed of the husband and wife, which naturally would cease to exist upon their divorce. Where there is a minor child, there still remains a "family" and a "family relationship" which is not severed by the divorce, and consequently a need for the protection of the homestead.

We respectfully submit that the judgment should be affirmed.

Respectfully submitted,

GEORGE GARDNER,
Attorney for Appellees.

No. 11350.

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REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

Statement of the Case.

Appellees in their brief in making Statement of the Case, on pages 1 and 2 thereof, contend that the absence of the minor from the homestead, beginning shortly prior to the hearing before the Referee, September 28, 1944, "was only temporary". But this is contrary to the testimony of the mother [Tr. pp. 86-87]; and the findings of the Referee [Tr. pp. 33-34], made December 31, 1945, showing such removal of the minor to be of a permanent character, and not "only temporary", as claimed by Appellees.

As the facts as set out in Appellant's Statement of the Case is not controverted, except as above, nothing further need be stated under that head.

ARGUMENT.

I.

A Homestead Exists Only Under and by Virtue of Statutes Creating and Regulating Them.

The Cook homestead was declared and recorded in June, 1940. Section 1238 of the Civil Code of California, as far as it affects this homestead, then read:

> "If the claimant be married, the homestead may be selected from community property or the separate property of the husband or, subject to the provisions of section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife."

Section 1239 provides for the consent of the wife and her joining in the declaration, if selected from her separate property. This was done by the Cooks, both joining in the declaration. This was a homestead for the husband and wife, and carried with it the right of survivorship, a legal and valuable right. Nothing is said in the statute about a "family" or "children"; their existence was not necessary to the establishment of this homestead by husband and wife, and the husband and wife constituted the family, with the right in each of survivorship. And minor children not being an element in the creation of such a homestead, would not be an element in its dissolution. In case of death, the surviving husband or wife took the property. In case the husband and wife wished to abandon the homestead or convey it for any reason, they had the absolute power to do so. Also in California where a

divorce takes place without any mention in the decree or disposition of the homestead or the real property on which it is declared, there is an "abandonment" of the homestead, as laid down in numerous California cases cited in Appellant's opening brief. The "family" is broken up and terminated and necessarily the homestead becomes abandoned and terminated.

There is another part of Section 1238, following the above quoted paragraph, which does indirectly relate to a "minor", among a class set up by Section 1261 of the Civil Code, which reads as follows:

> "When the claimant is not married, but is the head of a family, within the meaning of section 1261, the homestead may be selected from any of his or her property."

Section 1261 mentions "a minor" as among the class of persons, living with and supported by the head of a family. But that means a different and other selection and declaration of homestead, by a claimant who is not married. George O. Cook became a single or unmarried person when the final decree was entered, and might then have been eligible to select and declare a homestead, but he did not do so. But not on the separate property of his former wife.

From a careful consideration of the provisions of Section 1238 of our Civil Code, it seems evident that the contention of Appellees that the "family" for whose benefit the homestead was originally selected, "included Mr. and

Mrs. Cook, and their minor children", is erroneous. It might be true in a lay sense, but not in law. It is only when an unmarried person, as the head of a family, selects a homestead and bases his declaration upon the fact that a "minor child" resides with and is supported by him, being a necessary element of his declaration, can it be considered that the homestead was declared for the benefit of himself and his minor child, and as a part of his family.

The case of *City Store v. Cofer,* 111 Cal. 482, cited in Appellees' brief at page 5, was decided in 1895, and the *Zanone* and *Lang* cases in 1920, and so far as there is a conflict between them, the later cases would control.

In the last paragraph of Appellees' brief, on page 5, it is stated:

> "The nearest case, apparently, is the Lang case, *supra,* in which the Court lays down the rule that *in the absence of any minor child* a homestead is vacated by a decree of divorce in which the property is not mentioned."

We submit that this is a misconstruction of the *Lang* case and that no such rule was laid down in that case, as "in the absence of a minor child" etc. and this will be shown by even a casual examination of that case. The *Lang* case is fully analyzed in Appellant's opening brief.

II.

No Vested Rights in Minor to Survive After Divorce of Parents.

> "It is obvious that the declaration of homestead neither created nor vested any present title or interest in the minor son at the time the declaration was made and that any interest to which he might become entitled would be by virtue of the provisions of section 1265 of the Civil Code, *i. e.,* by succession as an heir."
>
> *Gerlach v. Copeland,* 212 Cal. 758, 760.

As death did not intervene, while the Cooks were husband and wife, the minor daughter never had or acquired that interest. But a divorce took place between the Cooks, under the circumstances of that case, already related, which made the parents of the minor single persons, and remitted each to his former status of owners of the property covered by the homestead, destroying at the same time the right of survivorship as to the homestead, and the homestead itself; then how could the exemption rights of either parents, existing before the divorce, be preserved by the residing of a minor child, who has no vested interest in the homestead, with either of her parents. Appellees' contentions in this respect are erroneous.

And the further fact that George O. Cook, in whose behalf this contention is made, was the party at fault in the divorce case which was granted on the ground of extreme cruelty, the custody of the minor awarded to the mother, and the father ordered to pay a weekly sum for her keep and maintenance would be against such contention, as he was not then the head of a family. (*Holcomb v. Holcomb,* 18 N. D. 561, 120 N. W. 547.) We hold no brief for the mother, the other bankrupt, but say that

she also lost her homestead right by the divorce; however, it seems an unholy argument that the guilty party could have his minor daughter live on the homestead property with him for a time, and then claim by this transient fact, that the homestead is his to enjoy with his second wife, without let or hinderance, while his wife and his creditors cool their heels in some distant place.

Or is it the contention of Appellees that both of the bankrupts, now single persons, have the same homestead rights they had before the divorce, and can live in this house together, or with the minor daughter and also with the second wife; in fact would have a legal right to do so? We do not think that the law should be so construed as to countenance this arrangement. As was said in the case of *Skinner v. Walker,* 98 Ky. 729:

> "The joint occupancy and enjoyment of the homestead by the man and woman, became utterly impractible after the severing of the marital relations, and that certainly was not contemplated by the legislature."

Nor do we think that such an arrangement was ever contemplated by our legislature or the Courts in construing a case such as here presented. We submit that the judgment should be reversed with appropriate instructions and requested in Appellant's opening brief.

Respectfully submitted,

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Attorney for Appellant.